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No. _____

In The Supreme Court of the United States

KEISHA CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Fourth Circuit erred when it held, in direct conflict with the decisions of nine other circuits, that the use of multiple guns in a single drug conspiracy supports multiple convictions under 18 U.S.C. § 924(c)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Keisha Carter, respectfully prays this Court grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceeding on July 30, 2002.

OPINIONS BELOW

The July 30, 2002, panel opinion of the United States Court of Appeals for the Fourth Circuit, reported at 300 F.3d 415 (4th Cir. 2002) is reprinted App. 1.

The verdict entered on October 8, 1998 and the judgment, entered on December 15, 1998, in the Eastern District of North Carolina are reprinted at App. 69 and App. 40.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this action issued on July 30, 2002. The jurisdiction of this Court to review the judgment of that Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves an interpretation of 18 U.S.C. § 924(c)(1). The provision of this Statute is set out in the Appendix hereto at App. 56.

STATEMENT OF THE CASE

A. THE FACTS

Keisha Carter was indicted in a five-defendant, 38 count indictment on three counts: conspiracy to distribute and possess with intent to distribute crack cocaine and other controlled substances, in violation of 21 U.S.C. § 846 and two violations of 18 U.S.C. §§ 924(c) and 2 for use or carrying of a firearm during and in relation to a drug trafficking crime, and aiding and abiding the same.

At trial, a total of twenty-seven witnesses testified for the Government, but only eight provided any testimony against Carter. Although the Government's case provided evidence spanning ten years of events, the only evidence against Keisha Carter focuses on the events of one day, June 20, 1997. The sum and substance of the entire case against Keisha Carter, taken in a light most favorable to the Government, shows that in the early morning hours of June 20, 1997, a group of individuals, including George Tyrell Gibbs (a.k.a. Scottie Davis, "Rat"), Keisha Carter's boyfriend, picked up defendant in a blue Chevrolet Blazer at her home. Fourth Circuit J.A. at 804, 865-66. Gibbs, DeMario Hopkins, Dwayne Melvin and Kenneth Davis were present in the Blazer. Id. Prior to calling Keisha, this group had contemplated a robbery for money and drugs. Id. at 511. According to each of the men present in the Blazer, all of whom testified for the Government after striking plea agreements, the men possessed several weapons including a handgun, assault rifle, and a "street

sweeper" shotgun. Id. at 867. According to the men, when the issue of a target for the robbery was raised in the Blazer, Keisha suggested another drug dealer, Eric Carter, as a possible target. Id. at 512. Ostensibly, after at least one phone call and one visit to the residence, Keisha was able to get Eric Carter to open the door to his home. Id. at 512-14. According to Eric Carter, Keisha said she was "sorry", and backed away allowing Gibbs, Hopkins and Davis, each carrying a weapon, to enter the residence. Id. at 667. The men then obtained approximately one quarter pound of marijuana and some cash during the robbery and fled. At no time did Keisha Carter possess any weapon or enter the Eric Carter house.

Following that robbery, the group headed to Clinton, North Carolina, where they stayed in a motel. Id. at 807-08. Two rooms were obtained. Gibbs and the defendant slept in one room; Hopkins, Melvin and Kenneth Davis in the other. Id. at 984. For several hours early that morning, a potential bank robbery in Garland, North Carolina was discussed between the men; however, all testified Keisha Carter was not present during those conversations. Id. at 632, 869, 984. The next morning, the group departed Clinton and drove to a trailer in rural Sampson County which was the residence of Kenneth Davis' girlfriend. At the trailer, the group was joined by three other men: Edward Ward, Perry Moore and someone named "Bill." At this point, the men continued their discussion of the bank robbery and Keisha Carter was assigned the role to drive the Blazer and the "get-

away" vehicle. Id. at 633. According to the Government's case, Keisha Carter was present for these final discussions on the porch at the trailer. Id. at 984.

Later that day, Carter drove the Blazer and was accompanied by Gibbs and Melvin. They remained parked in a spot one half mile from the Garland Bank. Id. at 611-12. The other five, Ward, Hopkins, Davis, Moore and "Bill" approached the bank in a Nissan Sentra. Two of the five men went into the bank with a handgun and an assault rifle. However, after a premature discovery of the group's possession of weapons by onlookers, and the ensuing chaos that resulted, the group did not complete the robbery and fled the bank. Id. at 808-09, 985-86. The two vehicles rendezvoused a short time later, and Ward, Hopkins and Davis got into the Blazer. They also shoved the guns they had used in the attempted robbery into the back of the Blazer. As the group left the area, Keisha Carter suggested they go to Charlotte, North Carolina, because she knew some individuals in that city. Id. at 831.

From this evidence, Petitioner was convicted on the two § 924(c) counts and a mistrial was declared on the conspiracy count. Defendant received a mandatory sentence of twenty-five years imprisonment.

B. PROCEEDINGS IN THE COURTS BELOW

Keisha Carter was sentenced to consecutive prison terms of five and twenty years based upon her convictions for two violation of 18 U.S.C. § 924(c)(1), which makes it a federal crime to use or carry a firearm

during or in relation to a drug trafficking crime. Both counts of conviction were based on the same predicate drug trafficking crime: to wit, conspiracy to distribute and possess with intent to distribute crack cocaine and other controlled substances in the Eastern District of North Carolina. Following the conclusion of evidence, petitioner was convicted on the two § 924(c) counts, but the jury was unable to reach a verdict and a mistrial was declared on the conspiracy count.

On appeal, Petitioner challenged, intra alia, the fact that she may not be sentenced to multiple terms for two § 924(c) offenses that arose from a single predicate drug trafficking offense. In a per curiam opinion the Fourth Circuit found that although "[a] number of other circuits have adopted the position the defendant now urges on the Fourth Circuit...we have already reached the issue and decided it in a manner contrary to defendant's position. See United States v. Camps, 32 F.3d 102, 106 (4th Cir. 1994) cert. denied, 513 U.S. 1158 (1995)." 300 F.3d 415 at 9 (4th Cir. 2002).

This issue in this case, simply put, is whether each § 924(c)(1) count must be supported by a separate predicate offense. Nine of the ten other circuits that have decided this issue have reached a decision in direct conflict with the Fourth Circuit's prior opinion in Camps, supra, and in this case. For the reasons which follow, and now with the benefit of multiple scholarly opinions from most of the other circuits in the Nation, this Court should undertake an a review of this most important issue affecting the fair and equitable administration of criminal justice in the Fourth Circuit and the United States.

REASON FOR GRANTING THE WRIT

I. The Fourth Circuit's holding that a District Court may impose consecutive sentences for two § 924(c)(1) violations based on the same underlying predicate offense, conspiracy to distribute, cocaine and possession with intent to distribute is in direct conflict with every other circuit in the Nation, fundamentally misinterprets the language of § 924(c) and undermines the uniformity in administration of justice on gun counts that the statute was designed to achieve.

18 U.S.C. § 924(c)(1) states, in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such crime violence or drug trafficking crime be sentenced to imprisonment for five years.... In the case of his second or subsequent conviction under this subsection, such persons shall be sentenced to imprisonment for twenty years.... (Emphasis added.)

The critical question, which has divided the circuits, is the meaning of the phrase "whoever, during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm." The language of this section can be interpreted in one of two ways: (1) each time a defendant uses or carries a

firearm in relation to a crime, he commits a separate crime; or (2) if, during the course of a predicate crime, a defendant uses or carries a firearm at any time, he commits a separate crime. United States v. Anderson, 59 F.3d 1323, 1326 (en banc)(D.C. Cir. 1995). This former meaning opines the interpretive focus should be on the verb "uses" and not on the phrases "during and in relation to" or "crime of violence or drug trafficking crime." Id. This reading of § 924(c)(1) was adopted by the Fourth Circuit in Camps, supra. This view essentially holds that each separate deployment of a gun during and in relation to a drug crime is a new violation of the section. Thus, under this theory, whenever the defendant employs, brandishes or displays a gun during the commission of a predicate crime, he violates § 924(c)(1) as many times as he uses or carries the gun. Only the Eighth Circuit has joined the Fourth Circuit in so holding. See e.g., United States v. Freisinger, 936 F.2d 383 (8th Cir. 1991); United States v. Ortis-Martinez, 1 F.3d 662 (8th Cir.), cert. denied, 510 U.S. 936 (1993).

The latter meaning, however, instead articulates that the allowable unit of prosecution under § 924(c)(1) is the drug trafficking crime and not the individual firearms. That is, it does not matter how many times a single gun is "used" or "carried" during the commission of a drug trafficking crime nor how many guns are used during the relevant period because the statute contemplates only one § 924(c)(1) conviction for each event or series of events that constitutes one crime. In that regard, defendant can be charged with multiple underlying drug trafficking crimes, but if she only charged with one predicate for the § 924(c)(1)

violation, then only one § 924(c)(1) conviction may occur. In other words, once the jury determines a defendant has committed the underlying crime, it asked a binary question--whether defendant has or has not used a gun during and in relation to the crime. The answer to that question is either "yes" or "no", but it can not be "yes, yes."

Accordingly, under this second theory, each § 924(c) count needs to be tied to a different "crime of violence or drug trafficking crime." All but one of the courts of appeal have now addressed this question and nine of them have come down on petitioner's side, holding that the use of multiple guns in a single drug conspiracy will not support multiple convictions under § 924(c). See, e.g. United States v. Pena-Lora, 225 F.3d 17 (1st Cir. 2000); United States v. Lindsay, 985 F.2d 666, 674 (2d Cir.) cert. denied, 510 U.S. 832 (1993); United States v. Privette, 947 F.2d 1259, 1262-63 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992); United States v. Taylor, 13 F.3d 986, 992-94 (6th Cir. 1994); United States v. Cappas, 29 F.3d 1187, 1188-89 (7th Cir. 1994); United States v. Fontanilla, 849 F.2d 1257 (9th Cir. 1988); United States v. Smith, 924 F.2d. 889, 894-95 (9th Cir. 1991) United States v. Henning, 906 F.2d 1392, 1398-99 (10th Cir. 1990); cert. denied, 498 U.S. 1069 (1991); United States v. Rogers, 921 F. 2d 1089, 1092-93 (10th Cir. 1990), cert. denied, 501 U.S. 1211 (1991); United States v. Parra, 2 F.3d 1058, 1070-71 (10th Cir.) cert. denied, 510 U.S. 1026 (1993); United States v.

Hamilton, 953 F.2d 1444 (11th Cir.), cert. denied, 506 U.S. 871 (1992); United States v. Anderson, 59 F.3d 1326(en banc)(D.C. Cir. 1995).[1]

The problem with Freisinger, supra, and its progeny is its main premise - - that the word "firearm" is the "object" of the § 924(c)(1) offense. The word "firearm" is not the subject of § 924(c) to which the statute's unit of prosecution is linked. § 924(c) clearly focuses on firearms only to the extent a defendant uses or carries them "during and in relation to" crimes of violence or drug trafficking crimes. United States v. Taylor, 13 F.3d at 993. "The statute emphasizes the relationship between the firearms and the underlying drug-trafficking crime, rather than the individual firearms themselves . . . ." United States v. Lindsay, 985 F.2d at 673. Indeed, Congress has enacted a host of other statutes addressing firearms in other contexts. The purpose of § 924(c)(1) is to target defendants who choose to involve weapons in an underlying trafficking crime or crime of violence. The predicate offense, which is commission of the drug trafficking crime, not the firearm, is the object of the compound criminal statute set forth in § 924(c)(1). United States v. Taylor, 13 F.3d at 993-94.

Furthermore, the minority position would be stronger if the statute employed "use" as a noun, such that "a use" of a gun in relation to a drug crime would violate the statute. However, it appears that the draftsmen were not employing the word "use" to imply that each discrete act might be a separate "use"

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[1] Thus, only the 3d Circuit appears not to have definitively ruled on this issue.

and crime. United States v. Anderson, 59 F.3d at 1326-27. The statute's pairing of "uses" with "carries" strongly suggests Congress did not seek to criminalize every discrete deployment of a gun during an extended period when a drug crime, particularly a conspiracy, was being committed. "'Carries' does not easily lend itself to a meaning that suggests a discrete act; rather, it implies a continuing activity." Id. at 1327. Yet, since Congress did not intend a § 924(c) violation to occur on each of potentially dozens or hundreds of occasions that a defendant "carries" a gun during an ongoing drug trafficking crime, particularly a conspiracy, it follows that Congress would not have intended each deployment in the same context to be a separate "use." Id. Furthermore, if Congress had contemplated such a scheme, Congress could easily have written the words "each time" or "on each occasion" in the section to make that meaning clear. It did not. The most logical explanation of the precise language chosen for § 924(c)(1) is that Congress simply did not foresee the ambiguity which the statute has created.

In addition, § 924(c)(1) provides for very serious penalties for repeat violations. Under the Camps, supra analysis, if a defendant carries a gun three or four times during one underlying drug crime or crime of violence, it would as a practical matter, ensure a life sentence. "If Congress had intended that result, we would of course honor the choice; but we think that if Congress has wished the statute to operate in that fashion, it would have used the language making it obvious." Anderson, 59 F.3d at 1328.

Furthermore, the underlying drug offense or crime of violence is already made a federal crime under other sections of the Federal Code. If § 924(c)(1) was merely a penalty enhancement these cases would not arise at all. "But it is surely not illogical for Congress to make § 924(c)(1) a distinct crime tied to a predicate crime, and yet to treat it as a course of conduct or state of being armed. The result is that the government need not convict of--but it must prove--the predicate crime (which is why § 924(c)(1) has a hybrid character)." Id. at 1331 (emphasis in original).

Even though either interpretation of § 924(c)(1) may be plausible, the best that can be said for the statute is it is ambiguous and, under those circumstances, the Rule of Lenity dictates acceptance of the majority position. United States v. Anderson, 59 F.3d at 1333; United States v. Lindsay, 985 F.2d at 676; United States v. Coiro, 922 F.2d 1008, 1015 (2d Cir.) cert. denied 501 U.S. 1217 (1991); United States v. Chalan, 812 F.2d 1302, 1317 (10th Cir. 1987), cert. denied, 488 U.S. 983 (1988).

Finally, critical as well, is the government's repeated concession before a number of circuit courts (or at least lack of any argument to the contrary) that the use of more than one gun will not support multiple counts under § 924(c)(1) for the use of a firearm during a single drug trafficking crime. See, e.g., United States v. Pena-Lora, 225 F.3d at 32; United States v. Cappas, 29 F.3d at 1189; United States v. Privette, 947 F.2d at 1262.

CONCLUSION

§ 924(c)(1) provides that a defendant must use a firearm "during and in relation to" a drug-trafficking crime, thus requiring "some relation and connection between the firearm and the underlying crime." United States v. Feliz-Cordero, 859 F.2d 250, 254 (2d Cir. 1988). Accordingly, the statute emphasizes the relationship between the firearms and the underlying drug-trafficking crime, rather than the individual firearms themselves. United States v. Lindsay, 985 F.2d at 678. The statutory language thus provides some indication Congress did not intend a separate violation for each firearm. Id. To hold otherwise would mean that every time a defendant held, brandished or referred to a gun during the course of committing a drug trafficking offense, he would be indulging in a separate "impulse" and thus guilty of committing a separate § 924(c)(1) violation. In many conspiracies lasting a lengthy period of time, the same gun may be employed dozens of times and, thus under the Camps, supra rationale, with each separate "use of the gun" defined as a separate violation, it would not be unusual for the Government to obtain, as a practical matter, a life sentence whenever a gun accompanies a drug crime. To so hold exposes defendants to enhanced penalties Congress never contemplated.

If Congress had intended to impose such draconian penalties by requiring a defendant be convicted and consecutively sentenced for every time a defendant displays or fondles a gun in relation to the same drug trafficking conviction, surely it would have said so in clear language. It did not.

Accordingly, the only conclusion that can be drawn from the legislative language and sparse history, as well as through the Rule of Lenity, is "that Congress considered the appropriate unit of prosecution to be the underlying drug-trafficking offense, not the separate firearms. Only where the defendant commits multiple drug-trafficking crimes or violent crimes, and the government can link the firearms to those crimes...may the government prosecute for multiple violations of § 924(c)(1). Where the government links multiple firearms to a single crime, only one § 924(c)(1) violates occurs." United States v. Lindsay, 985 F.2d at 674.

Ten other federal circuits have now considered this question and all but one have ruled contrary to the Fourth Circuit's early opinion on this issue in Camps, supra which controlled disposition of the case at bar. It is now time for this Court to dispositively decide this question in light of the eloquent articulation and elucidation of the issue as it has percolated through nearly all of the other circuits. This is particularly so where the Government has conceded Petitioner's position before a number of other circuits, but refuses to do so in the Fourth Circuit.

Accordingly, Petitioner respectfully requests a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit issue to review the decision below.

RESPECTFULLY SUBMITTED, this 28th day of October, 2002.

BEAVER, HOLT, STERNLICHT, GLAZIER
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/s/: _____
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APPENDIX TO
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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Entered: July 30, 2002]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 98-4912
KEISHA CARTER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 98-4913
JERRY LEE MCRAE,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 98-4914
TIVARUS MONTIENTO MCRAE,
a/k/a/ Tat-Killer,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 98-4915
WILLIE JEROME MCRAE,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 98-4916
GILBERT DEVON MELVIN,
a/k/a G-Boy,
Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh
James C. Fox, District Judge
(CR-98-37)

Argued: December 3, 1999
Decided: July 30, 2002

Before WIDENER and MURNAGHAN,* Circuit Judges, and Cynthia H. HALL, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Affirmed by published per curiam opinion.

COUNSEL

ARGUED: Richard Brooks Glazier, Fayetteville, North Carolina, for Appellant Carter; Thomas Peter McNamara, HAFER, MCNAMARA, CALDWELL, CUTLER & CURTNER, P.A., Raleigh, North Carolina, for Appellant William McRae; Wayne Buchanan Eads, Raleigh, North Carolina, for Appellant Melvin; Rudolph Alexander Ashton, III, MCCOTTER, MCAFEE & ASHTON, P.L.L.C., New Bern, North Carolina, for Appellant Jerry McRae; Ray Colton Vallery, Fayetteville, North Carolina, for Appellant

* Judge Murnaghan heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. *See* 28 U.S.C. § 46(d).

Tivarus McRae. John Howarth Bennett, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** H. Geral Beaver, Fayetteville, North Carolina, for Appellant Carter. Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

OPINION
PER CURIAM:

I.

The instant case results from a Task Force investigation into drug trafficking in the area of the Campbell Terrace Public Housing Project in Fayetteville, North Carolina. An indictment naming 20 defendants was returned by the Grand Jury in the United States District Court for the Eastern District of North Carolina on March 3, 1998. In general terms, the indictment alleged (1) a conspiracy to distribute controlled substances, including heroin and crack cocaine, beginning January 1, 1987, and continuing until March 5, 1998, in violation of 18 U.S.C. § 846 (Count 1), and (2) firearms violations during the course and scope of the drug conspiracy, in violation of 18 U.S.C. § 924(c)(1) (Counts 2-38).

Of the 20 defendants named in the indictment, the five appellants in the instant case were joined for trial on September 29, 1998, in the United States District Court for the Eastern District of North Carolina.

From October 6-8, 1998, the jury deliberated and then returned verdicts with the following results:

(a) Keisha Carter was convicted of Counts Five and Six, and a mistrial was declared on Count One.

(b) Jerry McRae was convicted of Count One.

(c) Tivarus McRae was convicted of Counts One and Twenty-Six and was acquitted of Count Twenty-Seven.

(d) Willie McRae was convicted of Count One and acquitted of Count Twenty-Nine.

(e) Gilbert Melvin was convicted of Counts One, Thirty, and Thirty-Three and acquitted of Counts Thirty-One and Thirty-Two.

Keisha Carter was sentenced to 60 months in prison on Count Five and 240 months on Count Six. Jerry McRae was sentenced to life imprisonment. Tivarus McRae was sentenced to 292 months in prison on Count One and 60 months on Count Twenty-Six. Willie McRae was sentenced to life imprisonment. Gilbert Melvin was sentenced to life imprisonment on Count One, 60 months on Count Thirty and 240 months on Count Thirty-Three.

After sentencing, the five defendants filed a timely notice of appeal. The grounds of appeal are numerous, and we address only those specific grounds that merit discussion. We affirm the convictions and sentences.

II.

Defendants Jerry McRae and Gilbert Melvin appeal from the denial of their motion to suppress drug evidence seized from McRae's automobile in September of 1997. McRae and Melvin were arrested after Officer Lane Mooney of the Texas Narcotics Task Force seized cocaine and marijuana from McRae's automobile. In the trial below before the district court, McRae filed a motion to suppress the drug evidence. Melvin also adopted McRae's motion. The district court denied the suppression motions as to both defendants. We review a denial of a motion to suppress *de novo* regarding legal conclusion, with underlying factual determinations reviewed only for clear error. *See United States v. Seidman*, 156 F.3d 542, 547 (4th Cir. 1998).

The district court correctly held that Melvin lacked standing to challenge the search of McRae's automobile. A passenger in a car normally has no legitimate expectation of privacy in an automobile in which he asserts neither a property interest nor a possessory interest and where he disclaims any interest in the seized object. *See Rakes v. Illinois*, 439 U.S. 128, 148-49 (1978). In the instant case, Melvin denied even knowing whose car he was in at the time Officer Mooney pulled the car over and disclaimed any interest in the car's contents.

Accordingly, Melvin lacks standing to challenge the search, and the district court properly denied his motion to suppress the drug evidence.

The district court was also correct when it denied McRae's motion to suppress. The seizure occurred when Officer Mooney pulled McRae over for speeding. Officer Mooney testified that when he approached the vehicle, he smelled burnt marijuana in the air. He asked McRae, the driver, for permission to search the car. McRae refused. Officer Mooney then detained the car and retrieved a K-9 drug-sniffing dog from his patrol car for the purpose of conducting a walk-around search of the vehicle. During the walk-around, the dog "alerted" when walking by the driver's side door. Officer Mooney then searched the entire passenger compartment of the vehicle and found a quantity of marijuana on the passenger side of the center console. After discovering the source of the marijuana odor, Mooney then conducted an additional search of the locked trunk of the car, including a search of a closed suitcase in the trunk. Inside the suitcase, Mooney found a kilogram of cocaine.

Warrantless searches "are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *See California v. Acevedo*, 500 U.S. 565, 580 (1991). One such exception is the presence of "exigent circumstances" — an exception presumptively present in the automobile context because of the inherent mobility of the car and the danger that contraband inside the car may disappear if police take the time to obtain a warrant. *See California v. Carney*, 471 U.S. 386,

390-91 (1985). Thus the police may search a car without a warrant as long as there is probable cause to believe the car contains contraband. *Carney*, 471 U.S. at 392.

The police may also conduct warrantless searches of "closed containers" within an automobile, but only if they have probable cause to believe the closed container may contain contraband. *See Acevedo*, 500 U.S. at 580. Whether the warrantless search is of an automobile or of a closed container within an automobile, the limitation is the same: the scope of the search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982). As the Supreme Court held in *Acevedo*, a police officer who has probable cause to believe a paper bag deposited in the trunk of a car contains marijuana may conduct a warrantless search of the trunk and the paper bag; but the officer can not then conduct a warrantless search of the passenger compartment of the car, unless he also has probable cause to believe the passenger compartment contains contraband. *See Acevedo*, 500 U.S. at 580.

In the instant case, Officer Mooney clearly had probable cause to search the passenger compartment of McRae's vehicle without a warrant, based on the burning marijuana he smelled as he approached the car. The question is whether he also had probable cause to search the locked trunk of the car and the closed suitcase inside the trunk (where the cocaine was found).

The government argues that the K-9 drug dog's "alerting" on the driver side of the car gave Mooney probable cause to search the *entire* vehicle: including the trunk and the suitcase. We think that overstates the matter. Because probable cause must be tailored to specific compartments and containers within an automobile, the key is whether the dog "alerted" in the precise vicinity of the trunk. That is a question of fact that the district court resolved in favor of the government, finding that the dog's "alerting" was sufficiently close to the trunk to give Officer Mooney probable cause to believe it contained contraband. We review the district court's findings of fact in a suppression hearing only for clear error. *See Seidman*, 156 F.3d at 547; *see also United States v. Gray*, 137 F.3d 765, 769 (4th Cir. 1998). And it was not clearly erroneous for the district court to conclude that the dog's "alerting" was prompted by the contents of the trunk.

III.

Defendant Jerry McRae also appeals from the district court's denial of his motion to suppress drug evidence seized from his car during a separate warrantless search conducted by Fayetteville, North Carolina police officers.

On March 1, 1997, the police responded to a domestic violence report at McRae's residence. The police put McRae in the back of a police car and went back inside the home to talk to Ms. McRae. The police and Ms. McRae tell two conflicting versions of what happened next.

According to Ms. McRae, she never consented to the search of the vehicle she co-owned with her husband (Jerry McRae). She testified that the police officer took the car keys without her permission after she emptied the contents of her purse onto the kitchen counter.

In contrast, the police officer testified that he asked Ms. McRae if he could search the vehicle. After Ms. McRae asked why, the officer told her he wanted "to make sure [Defendant McRae] doesn't leave anything in the car" that could get her in trouble. Ms. McRae then allegedly responded "okay" and gave the car keys to the officer.

When the government justifies a warrantless search under the "voluntary consent" exception to the 4th Amendment's warrant requirement, the district court's factual determination as to whether consent to the search was actually given is reviewed for clear error. *See United States v. Analla*, 975 F.2d 119, 125 (4th Cir. 1992). The district judge found the officer's account was more reliable than Ms. McRae's and therefore concluded that Ms. McRae had in fact consented to the search of the vehicle. Given that this was a classic "he said, she said" scenario between the officer and Ms. McRae, the district court's decision to give the officer's story greater weight was not "clearly erroneous."

A related, but analytically distinct, issue is whether Ms. McRae's *factual* consent to the search was also "voluntary," *as a matter of law*. The defendant argues that the police coerced Ms. McRae's consent by saying: "We want to search your car to make sure Mr. McRae didn't leave anything in the interior that might get you in

trouble." The defendant argues that, by inducing fear in Ms. McRae, the police effectively intimidated her into consenting to the search.

Because the "voluntariness" of a search is a matter of law, it is reviewed de novo. The voluntariness of consent is determined by looking at the totality of the circumstances. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). While the police officers' comments, when viewed in isolation, seem rather manipulative, the atmosphere was not coercive when viewed under the totality of the circumstances. Ms. McRae was in her own home when she gave the consent to the search; and though the police officers' comments were obviously designed to induce consent from Ms. McRae, there is no evidence that her "will was overborne." *Id.* Accordingly, we affirm the district court's decision to deny Jerry McRae's motion to suppress the evidence obtained from his car on March 1, 1997.

IV.

While housed in county jail, Michael McEachern encountered Jerry McRae. McEachern later agreed to be a government witness in the prosecution of McRae. McEachern testified that McRae had made statements while in jail evincing a violent attitude towards case agents and others. McRae argued that the testimony should not have been admitted because the government failed to disclose the contents of the testimony to the defense pursuant to Fed. R. Crim. P. 16(a)(1)(A).

The district court disagreed and admitted the testimony. McRae now appeals. We review a district court's evidentiary rulings for abuse of discretion. *See United States v. Lancaster*, 78 F.3d 888, 896 (4th Cir. 1996).

McRae's argument is unpersuasive. Federal Rule of Criminal Procedure 16(a)(1)(A) only requires the disclosure of witness statements made "in response to interrogation" by a person acting as a government agent. McEachern's statements about McRae's violent propensities were not made in response to government interrogation, nor was McEachern acting as a government agent when he heard McRae's statements. The district therefore did not abuse its discretion by admitting the testimony over McRae's 16(a)(1)(A) objection.

V.

At the sentencing hearing, Keisha Carter was sentenced to consecutive prison terms of five and twenty years based upon her convictions for two violations of 18 U.S.C. § 924(c)(1), which makes it a federal crime to use or carry a firearm during or in relation to a drug trafficking crime. *See United States v. Mitchell*, 104 F.3d 649, 652 (4th Cir. 1997). Both counts of conviction (Counts 5 and 6) were based on the same predicate drug trafficking crime: namely, the conspiracy offense alleged in Count One. Carter filed a motion pursuant to Federal Rules of Criminal Procedure 29 and 33, seeking a judgment of acquittal or a new trial. Carter argues that she may not be sentenced to multiple terms for two section 924(c)

offenses that arose from a single underlying predicate drug trafficking offense. This is a question of law subject to de novo review. *See United States v. Campbell*, 977 F.2d 854 (4th Cir. 1992).

A number of other circuits have adopted the position the defendant now urges on the Fourth Circuit. But we have already reached the issue and decided it in a manner contrary to defendant's position. *See United States v. Camps*, 32 F.3d 102, 106 (4th Cir. 1994), *cert. denied*, 513 U.S. 1158 (1995). Because *Camps* is dispositive, defendant's argument is a non-starter.

VI.

Carter raises yet another argument relating to her § 924(c) conviction. To recapitulate, § 924(c) criminalizes the use or carrying of a firearm in relation to an underlying, predicate drug trafficking offense. *See Mitchell*, 104 F.3d at 652. Count One of the indictment against Keisha Carter charged her with the predicate drug trafficking offense. Count Five charged her with the § 924(c) firearm offense arising from the underlying drug trafficking offense in Count One.

The jury was unable to reach a verdict on Count One, but issued a guilty verdict on Count Five. Carter then filed a motion for judgment of acquittal as to Count Five, arguing that the jury's failure to convict her for the predicate offense in Count One precluded her conviction on Count Five. The district court denied her motion for judgment of acquittal.

The issue is one of first impression for this court. Carter relies on *United States v. Wilson*, 135 F.3d 291, 301 n.7 (4th Cir. 1998), where we stated (in dicta) that "[w]e will not go into detail about the evidence . . . on the 924(c) charge because that charge falls if its predicate offense (conspiracy) falls." From this dicta, the defendant attempts to extrapolate a Fourth Circuit judicial "leaning" in favor of her position.

The government, on the other hand, points to the decisions of several other federal circuits, all of whom have rejected Carter's argument and have held that § 924(c) convictions do not require convictions on the predicate drug trafficking offense as a prerequisite. *See, e.g., United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir. 1990) ("[I]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate."). Thus, on the government's theory, the drug trafficking predicate for a § 924(c) offense is satisfied as long as a reasonable jury *could* have found the defendant guilty of the drug trafficking offense, even if the actual jury in the case did not render a guilty verdict. The Fifth Circuit, in a post-*Munoz Fabela* case, has even taken the more extreme position that § 924(c) convictions are valid even when the jury *acquits* on the predicate drug trafficking conviction. *See United States v. Ruiz*, 986 F.2d 905, 911 (5th Cir. 1993).

Notwithstanding the dicta in *Wilson*, we adopt the position of the other federal circuits who have considered the question and hold that § 924(c) convictions do not require a conviction on the predicate drug trafficking offense. We find the *Munoz-*

Fabela approach more satisfying than the *Ruiz* approach because it requires at least some showing by the government that a reasonable jury *could* have convicted on the predicate drug offense.

Carter's conviction on Count Five passes muster under the *Munoz-Fabela* approach because the jury was unable to reach a verdict for conviction or acquittal on the predicate drug offense. Because there was no affirmative acquittal on Count One, a reasonable jury *could* theoretically have convicted on the predicate drug offense embodied by that Count.

VII.

Jerry McRae challenges the district court's finding that he was responsible for more than 500 but less than 1500 grams of crack cocaine, establishing a sentencing guideline base offense level of 36 pursuant to U.S.S.G. § 2D1.1. After consideration of other factors, McRae's guideline range was set at 360 months to life in prison.

Drug quantity determination is governed by the following standards. The Government must prove by a preponderance of the evidence the amount of controlled substances attributable to a defendant. *See United States v. Johnson*, 54 F.3d 1150, 1156 (4th Cir. 1995).

When objecting to drug quantities as set forth in the Presentence Report, the defendant has an affirmative duty to show that the information contained in the report is inaccurate or unreliable. *See*

United States v. Terry, 916 F.2d 157, 162 (4th Cir. 1990). A district court's findings regarding drug quantity are factual in nature and are reviewed only for clear error. *See United States v. Lamarr*, 75 F.3d 964, 972 (4th Cir. 1996).

McRae argues that the drug quantity determination the district court attributed to him was clearly erroneous because of a discrepancy between the trial testimony of Edward Ward (indicating Ward had only received cocaine from McRae on a few occasions) and Ward's statements to agents outside of court (which suggested Ward had purchased around 567 grams of cocaine from McRae).

Because the sentencing judge had only to find the relevant drug quantities by a preponderance of the evidence, the discrepancy in Ward's testimony is not fatal to the government's proof. The self-contradictions in Ward's testimony essentially raise a credibility issue – a question of fact that the district court must resolve at sentencing. The district court's factual findings regarding the relative credibility of Ward's two conflicting stories were not clearly erroneous. Neither were the resulting drug quantity determinations. Accordingly, the district court should be affirmed.

VIII.

Gilbert Melvin argues that he should not be held accountable during sentencing for drug amounts flowing from offenses of which he was acquitted. The Supreme Court, however, permits sentencing courts to take acquitted conduct into account for purposes of

determining drug amount, because of the lower standard of proof that applies at the sentencing stage. *See United States v. Watts*, 519 U.S. 148, 155-56 (1997) ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."); *see also United States v. Isom*, 886 F.2d 736, 738 (4th Cir. 1989). At sentencing, the government need only prove the "acquitted" drug conduct by a preponderance of the evidence, even though the government failed to convince a jury at trial beyond a reasonable doubt. *See Watts*, 519 U.S. at 156; *see also Johnson*, 54 F.3d at 1156.

The question for the instant case, therefore, is whether it was clearly erroneous for the district court to conclude that Melvin's "acquitted" conduct, while not proven beyond a reasonable doubt at trial, was still proven by a preponderance of the evidence for purposes of sentencing. *See United States v. Lamarr*, 75 F.3d 964, 972 (4th Cir. 1996).

The district court reviewed the entire trial record, the Presentence Report, and the testimony at the sentencing hearing. The court then concluded that the government had proven the drug amounts attributable to Melvin beyond a reasonable doubt. That finding was not clearly erroneous.

IX.

The district court found that Jerry and Willie McRae were organizational leaders of a criminal enterprise involving five or more participants

and consequently assessed them a four level increase in their sentencing guideline offense level pursuant to U.S.S.G. § 3B1.1(a). A district court's findings regarding offense enhancement are factual in nature and are reviewed only for clear error. *See United States v. Withers,* 100 F.3d 1142, 1147 (4th Cir. 1996).

Jerry McRae argues that he was merely a "street dealer" or "middle man" in a much larger drug distribution apparatus engineered by other parties. The level four enhancement was therefore too severe in his view.

However, there was a large quantity of evidence pointing to Jerry McRae's intimate involvement in the distribution of drugs in the Campbell Terrace projects. The same goes for Willie McRae, who seems to have had an even more active role in the drug trade. The record contains abundant testimony from street dealers in Campbell Terrace who identified Jerry and Willie McRae as the principal suppliers of crack cocaine to the street dealers in the housing project. Also, Anthony McNeill and Anthony Ray testified that more than ten people worked for the McRae brothers.

In view of this evidence, it was not clearly erroneous for the district court to conclude that Jerry and Willie McRae had leadership roles in the drug network and to assess a four level enhancement of their base offense levels.

X.

Evidence was submitted at the sentencing hearing that Gilbert Melvin shot and killed Gaylord Johnson during a drug-related altercation. When computing the base offense level for Melvin's drug conviction, the court took account of the killing, even though Melvin had not been indicted and convicted of murder. Finding the evidence of the killing nonetheless persuasive, the sentencing court set a base offense level of 43, relying on U.S.S.G. § 2D1.1(d)(1) (death during drug offense) in combination with U.S.S.G. § 2A1.1 (murder). Melvin contends that this was inappropriate, given that (a) he was never tried by a jury and convicted of murder and (b) even if the standard for proving murder is more relaxed in the sentencing context, there was still not enough evidence to prove he actually committed the murder.

In *United States v. Crump*, 120 F.3d 462 (4th Cir. 1997), we held that if a court's findings of fact at sentencing "may rationally be said to be supported by a preponderance of the evidence, they may not be disturbed on appeal." *Id.* at 468. Thus, if the district court concluded by a preponderance of the evidence that Melvin killed Johnson, that factual conclusion withstands appellate review as long as it was not clearly erroneous.

A preponderance of the evidence indeed supported the court's finding that Melvin killed Johnson. At the sentencing hearing, a deputy testified to statements made by Edward Ward, George Gibbs, and Earl Webb, all of whom implicated Melvin in the

killing. Thus the district court's factual conclusion as to Melvin's role in the killing was not clearly erroneous; and because the circumstances of the killing met the requisite legal definition of "murder," the corresponding base offense level of 43 was also appropriate under § 2D1.1(d)(1) and § 2A1.1.

As in *Crump*, Melvin's "real complaint is that he was, in effect, tried and sentenced for first degree murder without the benefit of a jury finding the same beyond a reasonable doubt." *Id.* Nonetheless, "[w]e have previously held that this method of `real offense' sentencing does not offend the Constitution." *Id.* (citing *United States v. Engleman*, 916 F.2d 182, 184 (4th Cir. 1990)).

XI.

Gilbert Melvin also received a Criminal History Category Score of VI because the court found him to be an "armed career criminal" under § 4B1.1. One is an armed career criminal if (a) the instant offense of conviction is a felony involving a crime of violence or controlled substance offense and (b) the defendant has at least two prior felony convictions involving a crime of violence or controlled substance offense. *See* U.S.S.G. § 4B1.1.

Melvin's first claim is that, because the instant drug conspiracy began in 1987 and continued until 1999, his felony conviction in 1993 for drug trafficking is not really a "prior" felony for purposes of § 4B1.1, since it postdated the onset of the drug conspiracy. Melvin's argument is unpersuasive. Conspiracy is a

continuing offense, constantly renewing itself. Accordingly, the 1993 conviction both preceded and postdated the "beginning" of the conspiracy, because conspiracies, by their very nature, do not have a "beginning" in the conventional sense of the word. Every other federal circuit to consider the issue has come to the same conclusion. *See, e.g., United States v. Belton*, 890 F.2d 9, 10-11 (7th Cir. 1989); *accord United States v. Marrone*, 48 F.3d 735, 741 (3rd Cir. 1995).

Second, Melvin claims that his prior assault convictions should not be treated as "violent felonies" under § 4B1.1 because, after he committed the assaults, North Carolina law changed the maximum punishment from two years to 150 days. *United States v. Johnson*, 114 F.3d 435 (4th Cir. 1997), forecloses this argument. There, we held that the sentencing guidelines "do not provide any support for . . . [the] notion that the nature of the conviction at the time of sentencing, rather than at the time of conviction, controls the career offender analysis." *Id.* at 445.

We therefore affirm the district court's decision to sentence Melvin as an armed career criminal under § 4B1.1.

XII.

In sentencing the defendants the district court did not have the benefit of the Supreme Court's decision in *United States v. Apprendi*, 530 U.S. 466 (2000), nor our subsequent decisions (among others) in *United States v. Angle*, 254 F.3d 514 (4th Cir. 2001) (en banc), *United States v. Promise*, 255 F.3d 150 (4th

Cir. 2001) (en banc), *United States v. White*, 238 F.3d 537 (4th Cir. 2001), and *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001), applying the rule in *Apprendi* to the federal drug statutes. Although, as just explained, we affirm the district court's process and findings in calculating the applicable sentencing guideline ranges for Jerry McRae, Tivarus McRae, Gilbert Melvin, and Willie McRae, we now must address the effect of *Apprendi* and our recent decisions on the sentences actually imposed on those defendants.

We next address whether the defendants' sentences under the federal drug statutes, 21 U.S.C. §§ 841 & 846, are invalid in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). During the pendency of this appeal, the Supreme Court held in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Each defendant, except Keisha Carter, argues that his sentence is invalid in light of *Apprendi* because it exceeds the maximum statutory penalty authorized by the jury verdict. Keisha Carter was not convicted on Count I, the conspiracy charge, so she makes no sentencing complaint here related to *Apprendi*.

In *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) (en banc), we held that drug quantity and type are elements of the offense under 21 U.S.C. § 846 that must be submitted to a jury and proven beyond a

reasonable doubt. See *Promise*, 255 F.3d at 151; see also *United States v. Angle*, 254 F.3d 514 (4th Cir. 2001) (en banc). The en banc court held that the maximum penalty that may be imposed on a particular defendant who possesses with the intent to distribute an identifiable but unspecified quantity of a schedule I or II drug is subject to a term of imprisonment of no more than 20 years. See 21 U.S.C. § 841(b)(1)(C). A sentence exceeding 20 years could be imposed only upon a finding by the jury that the offense involved a required threshold quantity of a schedule I or II controlled substance – for example, 1 kilogram or more of heroin. See 21 U.S.C. § 841(b)(1)(A)(i). Therefore, if the required threshold quantity of drugs was not found by the jury, a judge at sentencing could not impose a penalty in excess of 20 years, and it was error for a court to do so. The failure to instruct the jury on an element of an offense does not, however, constitute error per se; rather, we consider whether the error was harmless or plain. See Federal Rule of Criminal Procedure 52; see also *Neder v. United States*, 527 U.S. 1, 15 (1999) (holding that failure to instruct jury on essential element of offense is not structural error).

Because no defendant raised this argument[1] before the district court, our review is for plain error. See *United States v. Olano*, 507 U.S. 725, 731-32 (1993); Fed. R. Crim. P. 52(b). To reverse for plain error occurring at trial, a reviewing court must: 1) identify an

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[1] Although Willie McRae and Jerry McRae contested drug quantity at sentencing, they asserted the evidence on which the judge relied was "unreliable," not that the jury should have made that determination. Thus, they did not preserve the objection now made. See *United States v. Pratt*, 239 F.3d 640, 644 (4th Cir. 2001).

error; 2) that was plain; 3) that affects substantial rights; and 4) that seriously affects the fairness, integrity or public reputation of judicial proceedings. See *United States v. Olano*, 507 U.S. 725, 732 (1993); *United States v. Brewer*, 1 F.3d 1430, 1434-35 (4th Cir. 1993).

In *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001), this court answered the question raised in the fourth prong of the *Olano* analysis in the affirmative, holding that the failure to charge drug quantify in the indictment and submit it to the jury seriously affects the fairness, integrity or public reputation of judicial proceedings. See *Cotton*, 261 F.3d at 403-04. Our conclusion that we must exercise our discretion to notice these errors, however, was recently reversed by the Supreme Court in *United States v. Cotton*, 525 U.S. at ___, 122 S. Ct. 1781 (2002). The Court held that, "even assuming [defendants'] substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" where "the evidence . . . was `overwhelming' and `essentially' uncontroverted." *Cotton*, 122 S. Ct. at 1786. In the context of a vast drug conspiracy, not unlike this one, the Court concluded that "[t]he real threat then to the `fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." *Cotton*, 122 S. Ct. at 1787.

The Court's holding under its analysis in *Cotton* was that under an *Olano* plain error analysis we should not notice *Apprendi* sentencing error, where drug quantity was not alleged in the indictment nor proven to the jury, if the evidence is overwhelming and essentially uncontroverted. We thus address the four complaining defendants' sentences in turn and for the reasons that follow we affirm all four sentences.

A.

Jerry McRae was sentenced to life imprisonment for his conviction under Count One of the indictment, which alleged a violation of 21 U.S.C. § 846.[2] The indictment did not allege drug quantity, and the jury instructions did not state that the jury must find drug quantity. Thus, it was error for the district court to sentence Jerry McRae beyond the 20-year statutory maximum found in 21 U.S.C. § 841(b)(1)(C), and in light of *Apprendi* and our decision in *Promise*, this error was plain. See *United States v. Neal*, 101 F.3d 993, 998 (4th Cir. 1996) (holding that an error is plain "when the `settled law of the Supreme Court or this circuit' establishes that an error has occurred. . . .").

We need not notice this plain error, however, because even assuming Jerry McRae's substantial rights were affected, there is overwhelming and essentially

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[2] The provisions set out in 21 U.S.C. § 841(b) are incorporated by reference into § 846.

uncontroverted evidence supporting Jerry McRae's life sentence.[3] See *Cotton*, 525 U.S. at ___, 122 S. Ct. 1781, 1786 (2002).

Jerry McRae was a central figure in the drug conspiracy based in the Campbell Terrace public housing project of Fayetteville, North Carolina that continued for nearly a decade. There was ample evidence presented at trial and at the sentencing hearing that Jerry McRae was personally involved with far more than 50 grams of crack cocaine as well as large amounts of heroin and marijuana. Even if we accept McRae's assertion that the evidence offered by witness Edward Ward, attributing 567 grams of cocaine base to him, is invalid, McRae himself concedes that 56.70 grams of cocaine can be properly attributed to him based on Ward's testimony. This concession alone, without considering the additional evidence of drug quantity presented at the trial or at sentencing, provides overwhelming and essentially uncontroverted evidence that Jerry McRae was accountable for at least 50 grams of cocaine base. Where such evidence exists, even in the face of plain error, we need not recognize the error because the fourth prong of *Olano* is not met. *Cotton*, 525 U.S. at ___, 122 S. Ct. 1781, 1786 (2002).

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[3] The penalty for conspiracy to distribute 50 grams or more of cocaine base is "not less than 10 years or more than life." 21 U.S.C. § 841(b).

B.

Willie McRae was also sentenced to life imprisonment for his conviction under Count One of the indictment, which alleged a violation of 21 U.S.C. § 846. The indictment did not allege drug quantity, and the jury instructions did not state that the jury must find drug quantity. Thus, it was also error for the district court to sentence Willie McRae beyond the 20-year statutory maximum found in 21 U.S.C. § 841(b)(1)(C), and in light of *Apprendi* and our decision in *Promise*, this error was plain. See *Neal*, 101 F.3d at 998.

Similar to the case of Jerry McRae, we should not notice the error even if Willie McRae's substantial rights were affected, however, because there is also overwhelming and essentially uncontroverted evidence of Willie McRae's responsibility for at least 50 grams of cocaine base. See *Cotton*, 525 U.S. at ___, 122 S. Ct. 1781, 1786 (2002).

Willie McRae challenges the evidence of the drug quantity for which he was held accountable as unreliable. McRae argues that several of the sources relied upon by the court for evidence of drug quantity claimed that they engaged in drug transactions with McRae at times when McRae was actually incarcerated. McRae also asserts that the information on drug quantity obtained from sources who did not testify at trial is inherently unreliable. Even if we assume, without deciding, that McRae is correct and we discount any evidence of drug quantity supported by individuals who either did not testify at trial or who indicated they engaged in drug transactions with McRae from March

15, 1991 until April 15, 1994, a period of McRae's incarceration, we still find overwhelming, essentially uncontroverted evidence that Willie McRae was responsible for over 50 grams of cocaine base.

Anthony McNeil testified that over a period of more than a year, brothers Willie and Jerry McRae had an arrangement where they pooled money with McNeil and another McRae brother, Michael, to purchase drugs obtained by James "Buddy" Johnson in New Jersey. On a typical trip, Johnson returned with one kilogram of cocaine, sometimes in crack cocaine form, for this group. Just one of these repeated purchases of 1,000 grams of crack cocaine satisfied Willie McRae's 50-gram statutory crack cocaine requirement 20 times over. In light of this overwhelming and essentially uncontroverted evidence that Willie McRae is accountable for over 50 grams of cocaine base, we should not notice the *Apprendi* error in his sentencing. *Cotton*, 525 U.S. at ___, 122 S. Ct. 1781, 1786 (2002).

C.

Tivarus McRae was sentenced to 292 months imprisonment for violating 21 U.S.C. § 846 (Count One) and to 60 months imprisonment for violating 18 U.S.C. § 924 (c)(1) (Count Twenty-Six), the latter to run consecutive to the § 846 sentence. In total, Tivarus McRae received a 353-month sentence. Again, it was error for the district court to sentence Tivarus McRae beyond the 20-year or 240-month statutory maximum found in 21 U.S.C. § 841(b)(1)(C) for Count One, and in light of *Apprendi* and our decision in *Promise*, this error was plain. See *Neal*, 101 F.3d at 998.

Like Jerry and Willie McRae, we should not recognize the sentencing error, however, because there is overwhelming and essentially uncontroverted evidence that Tivarus McRae was accountable for over 50 grams of cocaine base, which would support a sentence of up to life in prison for Count One. See *Cotton*, 525 U.S. at ___, 122 S. Ct. 1781, 1786 (2002); 21 U.S.C. § 841(b).

George Jarrell Gibbs testified that he, Tivarus McRae, and Gary McCoy made crack cocaine purchases from Larry Dye seven or eight times, and each purchase ranged from one ounce to four and one-half ounces. Gary McCoy testified that Tivarus McRae made purchases from him of between four and one-half ounces and nine ounces of crack cocaine over a period of more than one year. Demario Hopkins testified that he bought quarter-ounce and half-ounce quantities of crack cocaine from Tivarus McRae so frequently that he could not remember the number of times. Edward Ward testified that Tivarus McRae received three-ounce and four-ounce quantities of crack cocaine from Jerry McRae on a regular basis, and that Ward purchased four ounces of crack cocaine from Tivarus McRae every other day during February and March of 1997. Ward also testified that he once saw Tivarus McRae with 18 ounces of crack cocaine. Anthony McNeil testified that Tivarus McRae purchased 14 to 28-ounce qualitites of crack cocaine from him twice weekly over a period of time.[4]

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[4] We consider that one ounce is equal to 28.38 grams.

We conclude that there was overwhelming and essentially uncontroverted evidence that Tivarus McRae should be held accountable for well over 50 grams of cocaine base, and thus we decline to notice the error in Tivarus McRae's sentence. See *Cotton*, 525 U.S. at ___, 122 S. Ct. 1781, 1786 (2002).

D.

Gilbert Devon Melvin was found guilty of violating 21 U.S.C. § 846 (Count One) and found guilty of two counts of violating 18 U.S.C. § 924(c)(1) (Counts Thirty & Thirty-Three). The district court sentenced him to life imprisonment on the § 846 count and to 60 months and 240 months on the counts under § 924(c)(1), the latter two sentences to run consecutive to the § 846 count, for a total of life plus 25 years. It was error for the district court to sentence Melvin beyond the statutory maximum found in 21 U.S.C. § 841(b)(1)(C) and in light of *Apprendi* and our decision in *Promise*, this error was plain.

Once again, however, because we conclude there is overwhelming and essentially uncontroverted evidence that Melvin is responsible for over 50 grams of cocaine base, we decline to notice the error and we affirm his sentence. See *Cotton*, 525 U.S. at ___, 122 S. Ct. 1781, 1786 (2002).

Evidence showed that Melvin was a drug dealer. Even if we discount evidence of the 425.25 grams of crack cocaine obtained in a robbery in which Melvin allegedly participated, as Melvin asserts we

should,[5] there is still ample evidence of cocaine base drug transactions to more than meet the 50-gram threshold to support a sentence of life imprisonment. Melvin bought crack cocaine from Gary McCoy numerous times, sometimes in half-ounce quantities. He also sold half-ounce quantities to Demario Hopkins on several different occasions, and he delivered a half ounce of crack cocaine to Edward Ward. Just four of these half-ounce transactions suffice to place Melvin above the 50-gram threshold. In addition, as is true of all the defendants convicted of the drug conspiracy detailed in Count One, to the extent their conduct was foreseeable to one another, each defendant is responsible for the drug amounts linked to each of the other conspirators.

XIII.

We have examined the briefs of the defendants and the record and after oral argument have discussed in the opinion the issues raised in those briefs which are of any consequence at all. Any other issues which may be gleaned from the briefs are without merit.

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[5] Melvin objected to inclusion of the 425.25 grams of cocaine base counted in his PSR as relevant conduct because the robbery incident served as the substantive basis of Count 32, a firearms charge of which he was acquitted. We hasten to note that conduct proven as evidence of a crime of which a defendant was acquitted may be used as relevant conduct in sentencing if proven by a preponderance of the evidence. See *United States v. Watts*, 519 U.S. 148 (1997); *United States v. Isom*, 886 F.2d 736 (4th Cir. 1989). We exclude consideration of the cocaine base related to the robbery only for the sake of argument.

The convictions and sentences of the defendants are accordingly

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Case No. 5:98-CR-37-03-F(2)

[Entered: November 2, 1998]

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	)
	)
KEISHA CARTER,	)
Defendant.	)

ORDER

This matter is before the court on the Defendant Keisha Carter's motion for acquittal or, in the alternative, for a new trial pursuant to FED. R. CRIM. P. 29(c) and 33. The Government has responded to Defendant's motion, and the matter is ripe for disposition.

I.

The Defendant was indicted on March 5, 1998, on one count of conspiracy to distribute and possess with the intent to distribute crack cocaine and other controlled substances in violation of 21 U.S.C. § 846. She also was charged in Counts 5 and 6 of the indictment with violations of 18 U.S.C. §§ 924(c) and 2 for using or carrying a firearm during and in relation to a drug trafficking crime, and aiding and abetting the same.

[1]The Defendant was arraigned on September 28, 1998, and a jury trial commenced the next day. On October 8, 1998, the Defendant was convicted by the jury of Counts 5 and 6 of the indictment.[2] The jury failed to

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1 The Indictment for both Counts 5 and 6 states:

> On or about June 20, 1997, in the Eastern District of North Carolina, KEISHA CARTER...knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924(c)(l) and (2).

Indictment, at 36.

2 At trial, the court instructed the jury as follows regarding the § 924(c) counts:

Section 924(c)(1) of Title 18 of the United States Code makes it a federal offense for anyone to use or carry a firearm "during and in relation to any... drug trafficking crime."

In order to meet its burden of proof for the crime of using or carrying a firearm during and in relation to a drug trafficking crime, the Government must prove the following two elements beyond a reasonable doubt:

> First: That the defendant[] committed a drug trafficking crime; and
> Second: During and in relation to the commission of that crime, the defendants knowingly used or carried a firearm.

A "drug trafficking crime" means any felony violation of federal [drug] law[s], including 21 U.S.C. § 846 involving conspiracy to distribute and possess with the intent to distribute crack cocaine or any other controlled substance. The offense alleged in Count One of this indictment is "drug trafficking crime."

Jury Instructions, at 21-22.

reach a verdict on the conspiracy count, and this court declared a mistrial as to that count.

The Defendant now has moved for acquittal or, in the alternative, a new trial on Counts 5 and 6 pursuant to FED. R. CRIM. P. 29(c) and 33. Essentially, Defendant argues that the jury's verdict was inconsistent in that by failing to reach a verdict on the conspiracy count, the jury could not have returned a verdict of guilty as to Counts 5 and 6. In other words, the Defendant argues that she cannot be found guilty of the crime of using or carrying a firearm during and in relation to a drug trafficking crime, as alleged in Counts Five and Six, if she was not found guilty of the underlying drug conspiracy in Count 1 of the indictment.

II.

In considering a motion for acquittal, a district court must uphold a jury's verdict if "there is substantial evidence, taking the view most favorable to the government, to support [a] finding of guilt." *United States v. Jackson*, 863 F.2d 1168, 1173 (4th Cir. 1988) (citation omitted). The evidence tending to demonstrate the defendant's guilt may be direct or circumstantial, and need not "exclude every reasonable hypothesis consistent with the defendant's innocence." *Id.* (citing *United States v. George*, 568 F.2d 1064, 1069 (4th Cir. 1978)). A new trial may be granted to a defendant "if required in the interest of justice," FED.R.CRIM.P. 33, and "only when the evidence weighs heavily against the verdict." *United States v. Arrington*, 757 F.2d 1484, 1486(4th Cir. 1985).

In this case, the Defendant bases her argument for acquittal or for a new trial on an alleged inconsistency in the jury's verdict. Defendant argues that all of the elements of the two offenses of using or carrying a firearm in relation to a drug trafficking offense could not have been proved beyond a reasonable doubt, as a matter of law, because the jury could not reach a verdict on the underlying drug trafficking offense (Count 1). In support of her argument, Defendant points to a footnote in *United States v. Wilson,* 135 F.3d 291 (4th Cir. 1998), in which the Court of Appeals for the Fourth Circuit stated: "We will not go into detail about the evidence against [the defendant] on the § 924(c) gun charge because that charge falls if its predicate offense (conspiracy) falls." *Id.* at 301 n.7.

This court does not find the above-quoted dicta to be controlling on the issue of whether the allegedly inconsistent verdicts in this matter can stand as a matter of law. In *United States vs. Powell,* 469 U.S. *57(1984),* the United States Supreme Court held that acquittal on charges of conspiracy to possess cocaine and possession of cocaine did not require that convictions of using a telephone to facilitate those offenses be vacated on the grounds of inconsistency of verdicts. *See Id.* at 68-69. In so holding, the *Powell* Court reasoned that although inconsistent verdicts indicate that the jury did not speak its real conclusions, they do not necessarily indicate that the jury was not convinced of a defendant's guilt. *See Id.* at 64-65. Rather, it cannot be determined from such inconsistency whether the government or the defendant has reaped a windfall: the jury may have acquitted on the underlying offense

because of lenity even though it was convinced of the defendant's guilt. *See id.* at 65. The *Powell* Court therefore concluded that jury verdicts are insulated from review on the grounds of inconsistency, and review is limited to determining whether there was sufficient evidence to support the conviction of the defendant. *See Id.* at 67, 69; *see also United States v. Ruiz*, 986 F.2d 905 (5th Cir. 1993) (holding that "it is only the *fact* of the [underlying drug] offense, and not a conviction, that is needed to establish the required predicate [for a § 924(c)] conviction"); *United States v. Laing*, 889 F.2d 281 (D.C. Cir. 1989) (holding that conviction on § 924(c) count was supported by sufficient evidence to show guilt beyond a reasonable doubt even though defendant was acquitted of "underlying drug trafficking offense").

Therefore, in this case, the court will not vacate the Defendant's verdict despite the alleged inconsistency of the jury verdict unless the Government failed to produce sufficient evidence of the underlying drug offense. At trial, the Government evidence through the testimony of several witnesses demonstrated that for a period of time in 1997, a number of individuals from or acquainted with individuals from the Campbell Terrace Housing Project in Fayetteville, N.C., were involved in drug sales and in a string of robberies for the purpose of obtaining additional drugs for sale and money to procure more drugs. Seven different witnesses testified about a series of events between June 20, 1997, and June 26, 1997.

Taken in the light most favorable to the Government, the evidence demonstrated that in the early morning hours of June 20, 1997, a group of individuals, including George Tyrell Gibbs (a.k.a. Scottie Davis, Rat), the Defendant's boyfriend, picked up the Defendant in a blue Chevrolet Blazer at her home. The Defendant, Gibbs, DeMario Hopkins, Dwayne Melvin and Kenneth Davis were present in the blazer. The group had several weapons including a handgun, an assault rifle and a "street sweeper" shotgun. The group was looking for a robbery target in order to obtain drugs for use and sale. According to the four other individuals in the car, the Defendant suggested another drug dealer, Eric Carter, as a possible target for robbery. After at least one phone call and one visit to the residence, the defendant was able to get Eric Carter to open the door to his home. The defendant told Eric Carter she was "sorry," and backed away allowing Gibbs, Hopkins and Davis, each carrying a weapon, to enter the residence. Gibbs, Hopkins and Davis obtained approximately one-quarter pound of marijuana and some cash during the robbery.[3]

The evidence also demonstrated that, following the robbery, the group headed to Clinton, N.C., where they stayed in a motel. In the morning, the group departed Clinton and drove to a trailer in rural Sampson County which was the residence of Kenneth Davis. At the trailer, the group was joined by Edward Ward, Perry Moore, and someone named "Bill." At this point, the group planned to rob a bank in nearby

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3 These facts formed the basis of Count 6 of the indictment.

Garland, N.C. The purpose of the attempted bank robbery was to get more money to buy additional quantities of drugs for sale. The plan was for the group to take two vehicles. The defendant was going to be the "getaway driver." She drove the Blazer and was accompanied by Gibbs and Melvin-they remained parked in a spot near the Garland bank The other five, Ward, Hopkins, Davis, Moore, and "Bill" approached the bank in a Nissan Sentra. Two the five men went into the bank with a handgun and an assault rifle. Fearing that they had been prematurely discovered, the group did not complete the robbery. The two vehicles rendezvoused a short time later, and Ward, Hopkins and Davis got into the Blazer; they brought the guns used in the attempted robbery into the Blazer.[4] As the group left the area, the Defendant suggested that they go to Charlotte, N.C., because she knew individuals who could identify other potential robbery targets in that city. While there, the group sold some of the marijuana taken from Eric Carter's residence.

Again, taken in the light most favorable to the Government, this court concludes that the evidence presented at the Defendant's trial was a sufficient showing such that a reasonable jury could have found that the Defendant conspired with others to distribute and possess with the intent to distribute drugs in violation of 21 U.S.C. § 846 as charged in Count One of the Defendant's indictment. Thus, the fact that the jury could not reach a verdict on Count One does not preclude the Defendant's conviction on the two §

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[4] These facts formed the basis of Count 5 of the indictment.

924(c) counts. Therefore, the Defendant's motion for acquittal, or in the alternative, for a new trial hereby is DENIED.

IV.

In a motion filed with her co-Defendants, the Defendant Carter also moved for acquittal on "the ground that the 18:924(c) convictions applicable to [the] Defendant[was] or might have been obtained in violation of the rulings of *Bailey v. United States,* 516 U.S. 137 (1995) and *United States v. Mitchell,* 104 F.3d 649 (4th Cir. 1997)." This assertion is the extent of the Defendant's argument on this motion. Because the court concludes that the Defendant's § 924(c) convictions did not violate the dictates of *Bailey* and its progeny, *see Mitchell,* 104 F.3d at 653-54 (defining the "carry" prong of § 924(c) to include having a gun or guns in a car during and in relation to a drug trafficking crime), the Defendant's motion for acquittal on those grounds hereby is DENIED.

V.

For the foregoing reasons, the Defendant's motion for acquittal, or in the alternative, for a new trial on her convictions for violations 18 U.S.C. § 924(c) hereby is DENIED.

SO ORDERED.

This the 2nd day of November, 1998.

/s/ James C. Fox

UNITED STATES DISTRICT COURT
Eastern District of North Carolina - Western Division
Case Number: 5:98CR00037-003

[Filed: December 15, 1998]

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA,

v.

KEISHA CARTER.

Douglas W. Corkhill
Defendant's Attorney

THE DEFENDANT:

□ was found guilty on count(s) 5&6 after a plea of not guilty.

Title & Section:	18 U.S.C. § 924(c)(1)
Nature of Offense:	use and carry of a firearm during and in relation to a drug trafficking offense and aiding and abetting -18:2
Date Offense Concluded:	05/30/1997
Count Number(s):	5, 6

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

□ Count(s) 1 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Judgment:	12/15/1998
Defendant's Soc. Sec. No.:	238-21-0977
Defendant's Date of Birth:	04/22/1974
Defendant's USM No.:	17554-056

Defendant's Residence Address:
2123 Appleton Ct.
Fayetteville, NC 283069702

Defendant's Mailing Address:
2123 Appleton Ct.
Fayetteville, NC 283069702

/s/ James C. Fox
Signature of Judicial Officer

JAMES C. FOX
Date: 12/15/98 UNITED STATES DISTRICT JUDGE

Sheet 2- Imprisonment

Judgment - Page 2 of 7

DEFENDANT: **Keisha Carter**
CASE NUMBER: **5:98CR00037-003**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 25 year(s).

Cr.5- 5 years consecutive to any other term of Imprisonment
Cr. 6- 20 years consecutive to Ct. 5

☐ The court makes the following recommendation to the Bureau of Prisons
☒ The defendant is remanded to the custody of the United States Marshal for this district:
☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ on _____
- ☐ as notified by the United States Marshal

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before _____ on _____
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

DEFENDANT: **Keisha Carter**
CASE NUMBER: **5:98CR00037-003**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term on 3 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a

low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921 (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervisions-Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **Keisha Carter**
CASE NUMBER: **5:98CR00037-003**

SPECIAL CONDITIONS OF SUPERVISIONS

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall consent to a warrantless search by a United State probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measure and may require residence or participation in a residential treatment facility.

The defendant shall participate in a program of mental health treatment, as directed by the probation officer.

DEFENDANT: **Keisha Carter**
CASE NUMBER: **5:98CR00037-003**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$200.00	$12,700.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of _____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C § 3612(g).

☒ The court has determined that the defendant does not have to ability to pay interest and it is ordered that:

☒ The interest requirement is waived.
☐ The requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110 , 110A and 113A of Title 18 for offenses committed on or after 09/13/1994 until _____. An amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

Name of Payee	** Total Amount of Loss
Amount of Restitution Ordered	Priority Order of Percentage of Payment
Totals:	$_____ $_____

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title 18 of offenses committed on or after September 13, 1994.

DEFENDANT: **Keisha Carter**
CASE NUMBER: **5:98CR00037-003**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. ☒ in full immediately; or
B. ☐ _____ immediately, balance due in accordance with C, D, or E; or
C. ☐ not later than; or
D. ☐ in installments to commence __ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court establish a payment schedule if appropriate; or
E. ☐ in _____ installments of _____ to commence ____ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The fine consists of $6,350.00 on each of Cts. 5&6.

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons; Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: **Keisha Carter**
CASE NUMBER: **5:98CR00037-003**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The Court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level:
Criminal History Category: **I**
Imprisonment Range: **5 ys. Consec. On Ct. 5 and 20 yrs. Consec. On Ct. 6**
Supervised Release Range: **2ys to 3ys**
Fine Range:

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii)

☐ For offenses committed on or after September 13, 1994, but before April 23, 1996 that require a total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payments of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that exceeds 24 months, and the sentence is imposed for the following reasons:

OR

☐ The sentence departs from the guideline range:

☐ upon motion from the government, as a result of defendant's substantial assistance.

☐ for the following specific reasons:

18 U.S.C. § 924. - Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall -

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law -

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA WESTERN DIVISION
Case No. 5:98CR37-3F2

[Filed: October 14, 1998]

UNITED STATES OF AMERICA,	)
	)
vs.	)
	)
KEISHA CARTER.	)

****

MOTION FOR ACQUITTAL
or, in the alternative,
MOTION FOR NEW TRIAL

****

NOW COMES Keisha Carter, by and through her attorney undersigned, pursuant to Rules 29 & 33 of the Federal Rules of Criminal Procedure, and moves this Court for a Judgment of Acquittal, or, in the alternative, for a new trial. In support thereof defendant makes the following showing:

Keisha Carter was indicted and tried for three counts of a multi-defendant 38 count indictment which had as it's centerpiece in count one an allegation against all named defendants that they violated 21 U.S.C. § 841(a)(1) by conspiring to violate the drug trafficking laws of this country. All the remaining counts, specifically including counts five and six against this defendant, were 18 U.S.C. § 924(c) allegations. Together with four other defendants Keisha Carter plead not guilty and went to trial.

At trial the government offered testimony to show the two § 924(c) offenses alleged against Keisha Carter arose during a robbery and an attempted robbery, the purpose of each was to gain proceeds with which to purchase more drugs. The government contended that such robberies were a part of the conspiracy in the Indictment (p.4) and in its proof.

After deliberating in excess of eight hours over three days an obviously confused jury was unable to reach a unanimous verdict on the underlying conspiracy charge but convicted Keisha Carter of the two gun counts, counts alleged in the indictment to have been committed "during and in relation to a drug trafficking offense," Indictment, counts five and six (p. 36).

This verdict cannot stand. The defendant moves for a Motion for Acquittal pursuant to Rule 29 due to the insufficiency of the evidence against her on both gun counts for which she was convicted, and of the conspiracy charge where no verdict was reached. Alternatively, she moves this Court to Order a new trial on the gun counts pursuant to Rule 33 and asks they be joined for trial with the pending unproved conspiracy charge.

The result cannot stand as the jury verdict clearly demonstrated the inability of all twelve jurors to agree on one of the two elements of the §924(c) counts. The jury was instructed:

> In order to meet its burden of proof for the crime of using or carrying a firearm during and in relation to a drug trafficking crime, the Government must prove two elements beyond a reasonable doubt:
>
> First: That the defendants committed a drug trafficking crime; and
>
> Second: During and in relation to the commission of that crime, the defendants knowingly used or carried a firearm.
>
> A "drug trafficking crime" means any felony violation of federal law, including 21 U.S.C. § 846 involving conspiracy to distribute and possess with the intent to distribute crack cocaine or any other controlled substance. The offense alleged in Count One of this indictment is a "drug trafficking crime."

There was no evidence presented of any other drug trafficking crime with which the jury might have found to satisfy this element of the instruction; to convict Keisha Carter of the two gun counts she must first have been first convicted of the conspiracy charge.

It appears that this issue is not one addressed directly by our circuit. About the closest the 4th Circuit has come appeared in a footnote in U.S. v. Wilson, 135 F.3d 291 (1998). There the Court was examining the

effect of an improper closing argument by the prosecutor in a similar case to this one involving a drug conspiracy and § 924(c) counts. In the main body of the opinion Judge Michael wrote "we next examine the strength of the competent proof against Talley on the drug possession and conspiracy charges," 135 F.3d at 301, which was followed with the footnote "we will not go into detail about the evidence against Talley on the § 924(c) gun charge because that charge falls if its predicate offense (conspiracy) falls," 135 F.3d 307.

The Court in Wilson was trying to determine the prejudicial effect of an improper closing argument on the case at trial. It would seem that if the Court found such prejudice on the drug possession and conspiracy counts it would have to so find on the § 924(c) charge. Yet in the simple statement that the § 924(c) charge would fall "if its predicate offense (conspiracy) falls" the Court demonstrated the inexorable link between the two. Likewise, where the jury in Keisha Carter's case was unable to reach a verdict on the predicate offense (conspiracy) it is appropriate for this Court to acquit her or Order a new trial on all counts.

Although several other circuits have adopted a policy that would appear at first glance to allow such a verdict to stand, closer examination reveals a different perspective. A typical such case is U.S. v. Laing, 889 F. 2d 281(D.C. Cir. 1989) where a defendant was acquitted by the jury of a drug trafficking crime but found guilty of a § 924(c) violation. The D.C. Circuit refused to consider the theory of inconsistent verdicts, citing U.S. v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), then found the conviction ably supported by

evidence that a handgun was found at the defendant's home when a search was conducted and several witnesses testified that the defendant regularly carried the gun while conducting drug sales, 889 F. 2d at 289.

The evidence against Keisha Carter was not so compelling. There was no testimony of Keisha's participation in any drug sales, a fact the prosecutor made clear when he asked Scottie Davis a.k.a. 'Rat' "Let's get this clear right now, did you ever have any drug business with Keisha?" and the answer was "no." There was unsupported uncorroborated and contradicted testimony that Keisha had purchased a small amount of cocaine seven or eight years ago, and her own admission that she smoked marijuana. But there was no evidence that these acts were a part of the overall conspiracy.

Keisha's case is similarly distinguishable from Powell. Betty Lou Powell was charged with conspiracy to distribute cocaine and four counts of using the telephone to facilitate the conspiracy in violation of 21 U.S.C. §843(b). She was acquitted of the conspiracy charge and one of the telephone counts, convicted of the other three and appealed the inconsistent verdicts. The Supreme Court upheld the conviction, noting in the three instances Powell was convicted the "conversations indicated that respondent was helping her husband and son to distribute drugs and to collect money owed for drugs sold," 469 U.S. at 59.

While Betty Lou Powell was taking an active roll in the commission of the offense for which she was convicted, Keisha Carter did not No evidence was

presented that Keisha Carter herself ever touched a gun, held a gun, or used a gun in furtherance of a drug trafficking crime. The prosecutor conceded this in his closing argument to the jury.

The 10th Circuit considered the propriety of an indictment alleging a conspiracy to violate § 924(c) in U.S. v. Hill, 971 F.2d 1461 (1992). The Court, in a rehearing en banc, found such a charge, although isolated, appropriate. It also noted that while a defendant need be neither charged nor convicted of the underlying crime, "proof of an underlying crime is necessary to convict under 924(c)," 971 F.2d at 1464.

This same result was reached in U.S. v. Nelson, 27 F. 3d 199 (6th Cir. 1994), the Court stating "while it is not necessary for the government to charge a defendant with the underlying drug trafficking crime in a § 924(c)(1) prosecution, it is, of course, necessary that the government prove beyond a reasonable doubt all of the elements of § 924(c), one of which is that the defendant committed the underlying crime," 27 F.3d 201.

Finally, in U.S. v. Goines, 988 F.2d 750 (1993) the 7th Circuit held "as long as the Government proved that one coconspirator used or carried one firearm in furtherance of the conspiracy, any defendant *who was a member of the conspiracy* at that time can be convicted of [§ 924(c)]," 988 F.2d at 774 (emphasis added).

In each of these cases evidence was presented which showed the defendant was a knowing and willing participant in the actual crime for which he or

she was convicted. Keisha Carter, however, never used or carried a firearm during and in relation to the commission of a crime, the purpose of which was a further part of a drug conspiracy. There was no proof that Keisha Carter was a part of the conspiracy to distribute cocaine. At very best there was evidence that she participated in two robberies, but *her* connection to the underlying drug trafficking crime was never made. It is on this basis she moves for judgment of acquittal on the unproved conspiracy charge in count one of the indictment pursuant to Rule 29(c).

Count five deserves special mention, for here the government's case against Keisha Carter is the weakest. This is the allegation that she aided and abetted others who used or carried a firearm during an attempted bank robbery that was committed in furtherance of a conspiracy to distribute cocaine. Keisha was either a half block or a half mile, depending on which cooperating witness' testimony is believed, from the bank at the time of the attempt, if it in fact occurred. There is no evidence, such as testimony from bank tellers, police investigators or film from surveillance cameras, to support the testimony of the co-defendants that this crime was ever attempted. This is not a question of the weight or reliability of the corroborating evidence; there was no corroborating evidence.

There was also considerable inconsistency among the testimony of the various coconspirators. Demario Hopkins testified Keisha was not present at the time the robbery was planned while several others claimed she was. Kenneth Davis testified the weapons used at the attempt remained in one vehicle, not the

one Keisha was driving, while others recalled the guns switched cars. There was a disparity of opinion concerning what was said about going to Charlotte when six of them were in the Blazer after the purported attempt failed. This evidence, and lack of evidence, is insufficient to support a conviction on this count.

Wherefore, the defendant respectfully requests this Court to enter a Judgment of Acquittal pursuant to Rule 29 on either or both of the gun counts for which she was convicted, and of the conspiracy charge for which there was no verdict. In the alternative she requests this Court Order a new trial on the two § 924(c) counts and join them for trial with the pending conspiracy charge.

This the 15th day of October, 1998.

/s/ Douglas W. Corkhill
Attorney for Defendant
P.O. Box 1854
Raleigh, North Carolina 27602
(919) 834-7222
State Bar Number 10650

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Defendant Carter's Motion for Acquittal on the below listed attorneys, by either hand delivery or by depositing a copy of the same in the United States mail in a postpaid envelope addressed as follows:

John Bennett
Assistant United States Attorney
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Suite 800, Federal Building
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Thomas McNamara
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Rudolph Ashton
P.O. Box 12800
New Bern, N.C. 28561-2800

This the 15th day of October, 1998.

/s/ Douglas W. Corkhill
Douglas W. Corkhill
Attorney for Defendant
N.C. State Bar No. 10650
Post Office Box 1854
Raleigh, NC 27602
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
Case No. 5:98CR37-3F2

[Filed: October 8, 1998]

UNITED STATES OF AMERICA,

v.

KEISHA CARTER.

VERDICT

WE, THE JURY FIND: the defendant, Keisha Carter,

Guilty, as to Ct. 5;
Guilty, as to Ct. 6.

/s/Foreperson _____ 10-8-98
Foreperson's Signature Date

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION
Case Nos. 5:98CR37-1F2-20F2

[Filed: March 5, 1998]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
TONY ANTHONY BROWN	)
a/k/a "Fred Brown"	)
TERRY DEMETRIUS BYRD	)
a/k/a "Byrd"	)
KEISHA CARTER	)
~~LARRY EARL DYE~~	)
VERA VERONICA ELLIOTT	)
a/k/a "B.B."	)
DEMARIO ANTWAIN HOPKINS	)
a/k/a "Mario"	)
JAMES DAVID JOHNSON	)
a/k/a "Buddy"	)
KENNETH WAYNE JUDD	)
a/k/a "Big Boy"	)
MICHAEL TYWAN MARSH	)
a/k/a "Plump"	)
GARY WAYNE MCCOY	)
a/k/a "Suave"	)
JERRY LEE MCRAE	)
~~TIVARUS MONTIENTO MCRAE~~	)
a/k/a "Tat-Killer"	)
WILLIE JEROME MCRAE	)

GILBERT DEVON MELVIN)
a/k/a "G-Boy")
PERRY ALLEN MOORE)
ELVIN FREEMAN MORRISON)
a/k/a "Freeman Steele")
JEFFERY BERNARD PEATEN)
EVERETTE NATHANIEL QUILLER)
ANTHONY BERNARD RAY)
a/k/a "Ant")
EARL EDWARD WEBB)
a/k/a "E")

INDICTMENT

The Grand Jury charges that:

COUNT ONE

Beginning on or about January 1, 1987, the exact date being unknown to the Grand Jury, and continuing thereafter up to and including the date of this indictment, in the Eastern District of North Carolina and elsewhere, TONY ANTHONY BROWN, a/k/a "Fred Brown," TERRY DEMETRIUS BYRD, a/k/a "Byrd," KEISHA CARTER, LARRY EARL DYE, VERA VERONICA ELLIOTT, a/k/a "B.B.," DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," JAMES DAVID JOHNSON, a/k/a "Buddy," KENNETH WAYNE JUDD, a/k/a "Big Boy," MICHAEL TYWAN MARSH, a/k/a "Plump," GARY WAYNE MCCOY, a/k/a "Suave," JERRY LEE MCRAE, TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," WILLIE JEROME MCRAE, GILBERT DEVON MELVIN, a/k/a "G-Boy," PERRY ALLEN MOORE, ELVIN FREEMAN

MORRISON, a/k/a "Freeman Steele," JEFFERY BERNARD PEATEN, EVERETTE NATHANIEL QUILLER, ANTHONY BERNARD RAY, a/k/a "Ant" and EARL EDWARD WEBB, a/k/a "E," defendants herein, did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with each other and with other persons, both known and unknown to the Grand Jury, to knowingly, intentionally and unlawfully distribute and possess with the intent to distribute cocaine base (crack) and cocaine powder, Schedule II narcotic controlled substances, heroin and marijuana, Schedule I controlled substances, in violation of Title 21, United States Code, Section 841(a)(1).

OBJECT OF CONSPIRACY

1. The primary purpose of the conspiracy was to make as much money as possible for all of the co-conspirators through the continuous distribution of crack cocaine, heroin and other controlled substances in the Eastern District of North Carolina, and elsewhere. All of the co-conspirators at various times were participants in a drug trafficking organization which operated principally in the area of the Campbell Terrace Public Housing Project, Fayetteville, North Carolina, primarily controlled by JERRY LEE MCRAE, defendant herein, Michael Wayne Patterson, a/k/a "Block," Michael Scott McRae, and others. The members of this organization were on occasion known among themselves at the "Campbell Terrace Posse." In order to accomplish the goals of the conspiracy, the defendants played different roles and took upon themselves different tasks and participated in the

affairs of the conspiracy through various criminal acts. The defendants made themselves and their services available at various times throughout the conspiracy and would participate in the selective distribution of crack cocaine and other illegal drugs and carry and use firearms in connection with their drug trafficking crimes on an "as needed" basis, all linked over time by their mutual interest in sustaining the overall enterprise of catering to the ultimate demands of the drug consumption market in and around the Campbell Terrace Public Housing Project and the Fayetteville community in general. The roles assumed by some defendants were interchangeable at various times throughout the conspiracy. Some of the roles which the defendants assumed and carried out included, among others, that of financier, money launderer, supplier of drugs, organizer, courier, runner, protector, enforcer, and distributor.

2. It was further part of the conspiracy that the defendants and un-indicted co-conspirators would obtain quantities of illegal drugs, and money to obtain more drugs, during robberies and other unlawful activities.

3. It was further part of the conspiracy that the defendants solicited, recruited and hired other individuals in the Fayetteville, North Carolina area to receive and distribute crack cocaine and other illegal drugs.

4. It was further part of the conspiracy that the defendants caused to be distributed and distributed in the Eastern District of North Carolina and elsewhere, substantial quantities of crack cocaine and other illegal drugs.

5. It was further part of the conspiracy that the defendants cut and packaged crack cocaine and other illegal drugs in quantities for redistribution and retail sale.

6. It was further part of the conspiracy that defendants did acquire, possess, carry and use firearms in order to perpetuate their illegal drug trafficking activities in the Eastern District of North Carolina.

7. It was further part of the conspiracy that each defendant would commit and aid and abet in the commission of the criminal offenses involving the knowing and intentional distribution and possession with the intent to distribute a controlled substance, namely crack cocaine, cocaine powder, marijuana and heroin, in violation of Title 21, United States Code, Section 841(a)(1).

8. It was further part of the said conspiracy that the co-conspirators utilized various houses, motels and other sites in the Fayetteville, North Carolina area for the sale of crack cocaine and other illegal drugs.

OVERT ACTS

In furtherance of the conspiracy and to affect the objects thereof, the defendants and un-indicted co-conspirators committed at least one overt act in the Eastern District of North Carolina and elsewhere, including but not limited to the following:

1. On or about February 23, 1988, TONEY ANTHONY BROWN, a/k/a "Fred Brown," defendant herein, possessed 0.8 grams of powder cocaine with the intent to distribute.

2. On or about August 21, 1991, TONY ANTHONY BROWN, a/k/a "Fred Brown," defendant herein, possessed 0.41 grams of powder cocaine with the intent to distribute.

3. In or about January 1992, TONY ANTHONY BROWN, a/k/a "Fred Brown," defendant herein, fronted (provided on credit) Michael Darnell McEachern one ounce (28.4 grams) of powder cocaine and 4 grams of heroin.

4. In or about January 1993, TONY ANTHONY BROWN, a/k/a "Fred Brown," defendant herein, sold Napoleon Fisher 4 ounces (113.6 grams) of crack cocaine and 4 ounces (113.6 grams) of powder cocaine for $8,800.00.

5. On or about May 24, 1991, TERRY DEMETRIUS BYRD, defendant herein, possessed 0.2 grams of crack cocaine with the intent to distribute.

6. On or about December 9, 1991, TERRY DEMETRIUS BYRD, defendant herein, possessed 1.8 grams of crack cocaine with the intent to distribute.

7. On or about February 9, 1996, TERRY DEMETRIUS BYRD, defendant herein, possessed 274.1 grams of crack cocaine and 15.2 grams of powder cocaine with the intent to distribute.

8. In or about January 1997, TERRY DEMETRIUS BYRD, defendant herein, while armed with a SKS assault rifle, sold Edward Gemale Ward 3 ounces (85.2 grams) of marijuana for 240.00.

9. On or about June 9, 1997, TERRY DEMETRIUS BYRD, defendant herein, sold Agent McCall of the Cumberland County Bureau of Narcotics 13.3 grams of crack cocaine at 6546 Amanda Circle, Fayetteville, North Carolina.

10. On or about July 17, 1997, TERRY DEMETRIUS BYRD, defendant herein, and persons known to the Grand Jury attempted to rob another person known to the Grand Jury of narcotics related currency and crack cocaine, resulting in the shooting of the attempted robbery victim.

11. On or about August 1, 1997, TERRY DEMETRIUS BYRD, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," GILBERT DEVON MELVIN, a/k/a "G-Boy," and EARL EDWARD WEBB, a/k/a "E," defendants herein, while armed with various types of firearms, attempted to rob the residents of Lot 39, Country Estates Mobile Home Park, Clinton, North Carolina of crack cocaine and narcotics related currency.

12. On or about December 28, 1997, TERRY DEMETRIUS BYRD, defendant herein, possessed 2.5 grams of crack cocaine with the intent to distribute.

13. On or about June 20, 1997, KEISHA CARTER, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario", and PERRY ALLEN MOORE, defendants herein, along with persons known to the Grand Jury, while armed with various types of firearms did conspire and attempt to rob the Southern National Bank in Garland, North Carolina.

14. On or about June 20, 1997, KEISHA CARTER and DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendants herein, and persons known to the Grand Jury, while armed with various types of firearms, committed the home invasion robbery of the occupants of 5725 Waterwood Drive, Fayetteville, North Carolina, during which jewelry, wallets, $500.00 in narcotics related currency and ¼ pound (113.6 grams) of marijuana were taken.

15. In or about March 1990, LARRY EARL DYE, defendant herein, was fronted 2 grams of heroin from Anthony Dwayne McNeill in the Campbell Terrace Public Housing Project in Fayetteville, North Carolina.

16. In or about January 1991, LARRY EARL DYE, defendant herein, while armed with a .25 caliber handgun, and Anthony Dwayne McNeill purchased 2 ounces (56.8 grams) of crack cocaine for $1,600.00.

17. In or about May 1991, LARRY EARL DYE, defendant herein, and Anthony Dwayne McNeill purchased a total of one kilogram of crack cocaine on 4 separate occasions from a person known to the Grand Jury.

18. In or about June 1991, LARRY EARL DYE, defendant herein, and Anthony Dwayne McNeill purchased a total of one kilogram of crack cocaine on 4 separate occasions from a person known to the Grand Jury.

19. In or about July 1991, LARRY EARL DYE, defendant herein, and Anthony Dwayne McNeill purchased a total of one kilogram of crack cocaine on 4 separate occasions from a person known to the Grand Jury.

20. In or about June 1996, LARRY EARL DYE, defendant herein, and Anthony Dwayne McNeill purchased a total of one kilogram of crack cocaine for $22,000.00 from a person known to the Grand Jury.

21. In or about August 1996, LARRY EARL DYE, defendant herein, possessed three kilograms of crack cocaine.

22. In or about August 1996, LARRY EARL DYE, defendant herein, sold GARY WAYNE MCCOY, a/k/a "Suave," TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," defendants herein, and a person known to the Grand Jury a total of 9 ½ ounces (269.8 grams) of crack cocaine.

23. In or about September 1996, LARRY EARL DYE, defendant herein, sold GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, 20 ounces (568 grams) of crack cocaine and a Tec-9 handgun for $10,000.00.

24. In or about October 1996, LARRY EARL DYE, defendant herein, while armed with 2 .40 caliber handguns, possessed 2 kilograms of powder cocaine.

25. In or about October or November 1996, LARRY EARL DYE, defendant herein, distributed 4 ½ ounces (127.8 grams) of crack cocaine to persons known to the Grand Jury for $3,500.00 on 6 separate occasions.

26. In or about December 1996, LARRY EARL DYE, defendant herein, sold one kilogram of powder cocaine to a person known to the Grand Jury for twenty-thousand ($20,000.00) dollars.

27. On or about January 11, 1997, LARRY EARL DYE, defendant herein, possessed approximately 1.9 kilograms of crack cocaine and 174.2 grams of powder cocaine with the intent to distribute.

28. In or about February 1997, LARRY EARL DYE, defendant herein, fronted GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, 9 ounces (255.6 grams) of crack cocaine and Michael Terrence Reeves 2 ounces (56.8 grams) of crack cocaine at Cross Creek Mall in Fayetteville, North Carolina.

29. In or about April 1997, LARRY EARL DYE, defendant herein, purchased 9 ounces (255.6 grams) of crack cocaine from a person known to the Grand Jury.

30. On or about August 8, 1997, LARRY EARL DYE, defendant herein, possessed 0.5 grams of heroin with the intent to distribute.

31. On or about August 8, 1989, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, possessed 0.1 grams of powder cocaine with the intent to distribute.

32. In or about February 1990, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, sold a total of 5 ounces (142 grams) of powder cocaine and 5 ounces (142 grams) of powder cocaine to Anthony Dwayne McNeill on five (5) separate occasions.

33. On or about July 3, 1990, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, possessed 0.4 grams of powder cocaine with the intent to distribute.

34. In or about July 1990, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, while armed with a .38 caliber handgun, sold numerous bags of heroin to ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein.

35. In or about January 1996, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, while armed with a .25 caliber handgun, sold one ounce (28.4 grams) quantities of crack cocaine twice weekly for a 2 week period of time to person known to the Grand Jury.

36. On or about January 12, 1996, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, sold undercover Agent Shelly Vandevoorde of the Cumberland County Bureau of Narcotics 3.3 grams of crack cocaine.

37. On or about May 28, 1996, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, sold undercover Agent Freeman Esters of the Cumberland County Bureau of Narcotics 5.4 grams of crack cocaine.

38. On or about June 12, 1996, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, sold undercover Agent Freeman Esters of the Cumberland County Bureau of Narcotics 5.7 grams of crack cocaine.

39. On or about June 19, 1996, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, sold undercover Agent Freeman Esters of the Cumberland County Bureau of Narcotics 22 grams of crack cocaine.

40. On or about June 25, 1996, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, sold undercover Agent Freeman Esters of the Cumberland County Bureau of Narcotics 12.2 grams of crack cocaine.

41. In or about June 1996, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, was fronted ½ kilogram of crack cocaine by persons known to the Grand Jury.

42. In or about July 1995, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, while armed with a black in color 9 millimeter semi-automatic handgun, purchased one ounce (28.4 grams) of crack cocaine from Anthony Dwayne McNeill.

43. In or about February 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, and TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," defendant herein, while in possession of a grey in color nine (9) millimeter semi-automatic handgun, purchased one ounce (28.4 grams) of crack cocaine from Anthony Dwayne McNeill.

44. On or about February 29, 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, sold undercover Agent Burt E. Hyde, Jr. of the Cumberland County Bureau of Narcotics 0.1 grams of heroin.

45. On or about March 5, 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, sold undercover Agent Burt E. Hyde, Jr. of the Cumberland County Bureau of Narcotics 0.1 grams of heroin.

46. On or about March 18, 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, sold undercover Agent Burt E. Hyde, Jr. of the Cumberland County Bureau of Narcotics 0.1 grams of heroin.

47. On or about April 18, 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, sold undercover Agent Burt E. Hyde, Jr. of the Cumberland County Bureau of Narcotics 3 aluminum foil wrappers containing a white substance purported to be heroin.

48. In or about June 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, while armed with a black in color 9 millimeter semi-automatic handgun, purchased one ounce (28.4 grams) of crack cocaine from Anthony Dwayne McNeill.

49. On or about July 13, 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, possessed .01 grams of powder cocaine with the intent to distribute.

50. In or about September 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, while armed with a .45 caliber semi-automatic handgun, purchased one ounce (28.4 grams) of crack cocaine from a person known to the Grand Jury.

51. In or about October 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," and TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," defendants herein, purchased ¼ ounce (7.1 grams) of crack cocaine from Kendrick McMillan.

52. In or about December 1996, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, while armed with a firearm, robbed LARRY EARL DYE, defendant herein, of approximately $150.00 to $200.00 in narcotics related currency.

53. In or about January 1997, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, gave persons known to the Grand Jury a quantity of U.S. currency to travel to New York and purchase ½ kilogram of crack cocaine and 20 grams of heroin.

54. In or about March 1997, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," and EVERETTE NATHANIEL QUILLER, defendants herein, and persons known to the Grand Jury, while armed with various types of firearms, committed the home invasion robbery of the occupants of a residence located in Sampson County, North Carolina, during which jewelry, $6,000.00 in narcotics related currency, and various firearms were taken, and an unidentified Hispanic male was shot 7 to 8 times.

55. On or about June 15, 1997, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," PERRY ALLEN MOORE, and EVERETTE NATHANIEL QUILLER, defendants herein, and persons known to the Grand Jury, while armed with various types of firearms, committed the home invasion robbery of the residents of 153 Clapp Drive, Asheboro, North Carolina, during which narcotics related currency and jewelry were taken and one victim was assaulted about the head area with a handgun.

56. On or about June 16, 1997, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," and PERRY ALLEN MOORE, defendants herein, and persons known to the Grand Jury, while armed with various types of firearms, committed the home invasion robbery of the residents of Lot 29, Pine Lake Estates, Roseboro, North Carolina, during which $1,200.00 in narcotics related currency and one gram of crack cocaine was taken and one victim was shot in the lower extremity and one victim was assaulted with a deadly weapon.

57. In or about July 1997, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, while armed with a .380 caliber handgun, purchased one ounce (28.4 grams) of crack cocaine from a person known to the Grand Jury.

58. On or about July 12, 1997, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, and persons known to the Grand Jury, while armed with various types of firearms, attempted to rob another person known to the Grand Jury of $1,000.00 in narcotics related currency that the victim owed to DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, and a person known to the Grand Jury, during which an undetermined type firearm was taken from the victim and used to assault him about the head area.

59. On or about January 16, 1987, JAMES DAVID JOHNSON, a/k/a "Buddy," defendant herein, possessed 5 grams of marijuana with the intent to distribute.

60. In or about February 1995, JAMES DAVID JOHNSON, a/k/a "Buddy," defendant herein, traveled to New York and purchased 18 ounces (511.2 grams) of crack cocaine for $10,000.00.

61. In or about June 1995, JAMES DAVID JOHNSON, a/k/a "Buddy," defendant herein, traveled to New York and purchased 18 ounces (511.2 grams) of crack cocaine and 100 grams of heroin, which upon returning to Fayetteville, North Carolina, he sold to JERRY LEE MCRAE, defendant herein, while armed with a Smith and Wesson .38 caliber revolver, WILLIE JEROME MCRAE, defendant herein, and a person known to the Grand Jury for $17,000.00 dollars.

62. On or about January 23, 1996, JAMES DAVID JOHNSON, a/k/a "Buddy," defendant herein, sold undercover Agent Burt E. Hyde, Jr. of the Cumberland County Bureau of Narcotics 0.1 grams of heroin.

63. On or about August 10, 1996, JAMES DAVID JOHNSON, a/k/a "Buddy," defendant herein, while armed with a firearm, attempted to shoot a person known to the Grand Jury during a narcotics related dispute.

64. In or about October 1994, KENNETH WAYNE JUDD, a/k/a "Big Boy," defendant herein, sold one and one-half (1 ½) ounces of crack cocaine to Donnell Cradle on two (2) separate occasions.

65. In or about September 1996, KENNETH WAYNE JUDD, a/k/a "Big Boy," defendant herein, purchased one-quarter ounces (9.1 grams) of crack cocaine and one-half ounces (14.2 grams) of marijuana from a person known to the Grand Jury.

66. On or about October 19, 1996, KENNETH WAYNE JUDD, a/k/a "Big Boy," defendant herein, possessed 4.5 grams of crack cocaine with the intent to distribute.

67. On or about April 28, 1997, KENNETH WAYNE JUDD, a/k/a "Big Boy," defendant herein, and persons known to the Grand Jury, while armed with various types of firearms, committed the home invasion robbery of the residents of 7305 Pebblebrook Drive, Fayetteville, North Carolina, during which one ounce (28.4 grams) of crack cocaine and $400.00 in narcotics related currency were taken, and also during which a person known to the Grand Jury was assaulted in the head with a handgun, and a female juvenile was locked in a closet.

68. On or about January 30, 1990, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, possessed 1.2 grams of crack cocaine with the intent to distribute.

69. On or about November 9, 1991, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, purchased one kilogram of powder cocaine from undercover Agent Bruce Morrison of the Cumberland County Bureau of Narcotics for $24,000.00.

70. In or about June 1992, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, sold a person known to the Grand Jury three-quarters of an ounce (21.3 grams) of crack cocaine.

71. In or about September 1992, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, sold persons known to the Grand Jury one-half ounce (14.2 grams) of crack cocaine for $500.00.

72. In or about December 1992, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, sold a person known to the Grand Jury one ounce (28.4 grams) of crack cocaine.

73. In or about March 1993, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, sold a person known to the Grand Jury 7 grams of crack cocaine.

74. On or about May 8, 1993, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, possessed 1.2 grams of crack cocaine with the intent to distribute.

75. In or about June 1993, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, purchased one ounce quantities of crack cocaine on 3 separate occasions from a person known to the Grand Jury.

76. In or about January and February of 1994, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, while armed with a 9 millimeter semi-automatic handgun, sold a person known to the Grand Jury one ounce (28.4 grams) quantities of crack cocaine on 7 to 8 separate occasions, each deal arranged by ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein.

77. In or about June 1994, MICHAEL TYWAN MARSH, a/k/a "Plump," sold a person know to the Grand Jury $300.00 in value of crack cocaine for a cost of $100.00.

78. In or about July 1995, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, purchased one kilogram of crack cocaine from a person known to the Grand Jury.

79. On or about August 15, 1996, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, possessed 14.4 grams of crack cocaine and 47.2 grams of heroin with the intent to distribute.

80. On or about October 13, 1993, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, possessed 30.6 grams of marijuana and .5 grams of powder cocaine with the intent to distribute.

81. In or about September 1996, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, while armed with an Uzi machine gun and a .357 caliber handgun, sold a person known to the Grand Jury 2 ounces (56.8 grams) of crack cocaine.

82. On or about September 20, 1996, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, and a person known to the Grand Jury, while armed with various types of firearms, attempted to conduct a 7 ounce (198.8 grams) crack cocaine transaction with a narcotics dealer from Sanford, North Carolina, during which the unidentified dealer attempted to rob GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, and the person known to the Grand Jury of the crack cocaine, resulting in GARY WAYNE MCCOY, a/k/a "Suave," defendant herein and the person known to the Grand Jury opening fire on the narcotics dealer, and fleeing in an automobile owned by LARRY EARL DYE, defendant herein.

83. In or about October 1996, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, while armed with a .38 caliber revolver, sold a person known to the Grand Jury 4 ounce (113.6 grams) quantities of crack cocaine on 3 separate occasions.

84. On or about January 23, 1997, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, while armed with a black in color handgun, conducted a home invasion robbery of the occupants of 211 Deep Creek Road, Fayetteville, North Carolina, during which $695.00 in narcotics related currency was taken.

85. On or about October 11, 1988, JERRY LEE MCRAE, defendant herein, possessed 1.8 grams of powder cocaine and 0.3 grams of heroin with the intent to distribute.

86. In or about January 1994, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 40 grams of heroin and 2 ounces (56.8 grams) of crack cocaine.

87. In or about February 1994, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 40 grams of heroin and 2 ounces (56.8 grams) of crack cocaine.

88. In or about March 1994, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 40 grams of heroin and 2 ounces (56.8 grams) of crack cocaine.

89. On or about January 28, 1995, JERRY LEE MCRAE, defendant herein, possessed 3.95 grams of heroin with the intent to distribute.

90. In or about March 1995, JERRY LEE MCRAE, defendant herein, sold a person known to the Grand Jury one-half ounce (14.2 grams) of heroin for $3,000.00.

91. In or about May 1995, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 20 grams of heroin and 4 ounces (113.6 grams) of crack cocaine.

92. In or about June 1995, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 20 grams of heroin and 4 ounces (113.6 grams) of crack cocaine.

93. In or about July 1995, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 20 grams of heroin and 4 ounces (113.6 grams) of crack cocaine.

94. In or about August 1995, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 20 grams of heroin and 4 ounces (113.6 grams) of crack cocaine.

95. In or about September 1995, JERRY LEE MCRAE and WILLIE JEROME MCRAE, defendants herein, sold a person known to the Grand Jury a total of 20 grams of heroin and 4 ounces (113.6 grams) of crack cocaine.

96. ON or about March 1, 1997, JERRY LEE MCRAE, defendant herein, possessed 2.5 grams of heroin with the intent to distribute.

97. On or about August 13, 1997, JERRY LEE MCRAE, defendant herein, possessed 1.5 grams of heroin with the intent to distribute.

98. On or about September 16, 1997, JERRY LEE MCRAE, GILBERT DEVON MELVIN, a/k/a "G-Boy,", defendants herein, and a person known to the Grand Jury, possessed 2.2 pounds (one kilogram) of powder cocaine with the intent to distribute.

99. In or about April 1992, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, purchased 3½ ounce (99.4 grams) quantities of crack cocaine from a person known to the Grand Jury on 2 separate occasions.

100. In or about January 1994, TIVARUS MONTIENTO MCRAE, also known as "Tat Killer," defendant herein, sold a total of 2 ounces (56.8 grams) of crack cocaine to a person known to the Grand Jury.

101. In or about February 1994, TIVARUS MONTIENTO MCRAE, also known as "Tat Killer," defendant herein, sold a total of 2 ounces (56.8 grams) of crack cocaine to a person known to the Grand Jury.

102. In or about March 1994, TIVARUS MONTIENTO MCRAE, also known as "Tat Killer," defendant herein, sold a total of 2 ounces (56.8 grams) of crack cocaine to a person known to the Grand Jury.

103. On or about December 6, 1994, TIVARUS MONTIENTO MCRAE, also known as "Tat Killer," defendant herein, while armed with various types of firearms, possessed 0.1 grams of crack cocaine with the intent to distribute.

104. In or about March 1995, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, purchased one-quarter ounce (7 grams) quantities of crack cocaine from a person known to the Grand Jury on 10 separate occasions.

105. In or about March 1995, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, purchased one-half ounce (14.2 grams) of crack cocaine from a person known to the Grand Jury.

106. In or about August 1995, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, while armed with a grey in color 9 millimeter semi-automatic handgun, repaid a $1,000.00 drug debt and purchased 5 grams of heroin from a person known to the Grand Jury.

107. In or about August 1995, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, purchased one-half ounce (14.2 grams) of crack cocaine from a person known to the Grand Jury.

108. In or about January 1996, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, purchased one-half ounce (14.2 grams) quantities of crack cocaine from a person known to the Grand Jury on 15 separate occasions.

109. In or about March or April 1996, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," sold a person known to the Grand Jury a total of one-half ounce (14.2 grams) of crack cocaine.

110. In or about May or June 1996, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," purchased 21 grams of crack cocaine from a person known to the Grand Jury.

111. On or about September 27, 1996, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, possessed 2.4 grams of crack cocaine with the intent to distribute.

112. In or about February 1997, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, while armed with a semi-automatic handgun, sold one-quarter ounce (7.1 grams) quantities of crack cocaine to a person known to the Grand Jury on 5 separate occasions.

113. In or about March 1997, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, while armed with a .45 caliber semi-automatic handgun, and a person known to the Grand Jury showed Edward Gemale Ward one-half kilogram of crack cocaine.

114. In or about May 1997, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, while armed with a firearm, and persons known to the Grand Jury did shoot at several other rival narcotics dealers over an incident involving drug turf.

115. On or about August 29, 1997, TIVARUS MONTIENTO MCRAE, also known as "Tat-Killer," defendant herein, possessed 3.5 grams of crack cocaine and 1.5 grams of heroin with the intent to distribute.

116. In or about January 1995, WILLIE JEROME MCRAE, defendant herein, sold a person known to the Grand Jury a total of 12 grams of heroin and 2 ounces (56.8 grams) of crack cocaine.

117. In or about February 1995, WILLIE JEROME MCRAE, defendant herein, while armed with a 9 millimeter semi-automatic handgun, sold a person known to the Grand Jury a total of 12 grams of heroin and 2 ounces (56.8 grams) of crack cocaine.

118. On or about September 6, 1991, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, possessed 3.1 grams of crack cocaine with the intent to distribute.

119. On or about October 4, 1991, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, possessed a quantity of crack cocaine with the intent to distribute.

120. On or about April 15, 1992, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein and persons known to the Grand Jury, while armed with various types of firearms, attempted to rob another person known to the Grand Jury of 4 bags of marijuana, during which that person was shot 6 times.

121. On or about April 21, 1992, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, possessed one-half ounce (14.2 grams) of crack cocaine with the intent to distribute.

122. On or about October 13, 1999, GILBERT DEVON MELVIN, a/k/a "G-Boy," EARL EDWARD WEBB, a/k/a "E," defendants herein, and persons known to the Grand Jury, while armed with various types of firearms, attempted to rob another person known to the Grand Jury of narcotics, during which that person was shot several times.

123. On or about November 1, 1996, GILBERT DEVON MELVIN, a/k/a "G-Boy," while armed with a firearm, shot a person known to the Grand Jury several times in the lower extremities after suspecting that person of stealing $3,000.00 in narcotics related currency.

124. In or about January 1997, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, while armed with a .45 caliber semi-automatic handgun, sold a person known to the Grand Jury one-half ounce (14.2 grams) quantities of crack cocaine on 2 separate occasions.

125. In or about February 1997, GILBERT DEVON MELVIN, a/k/a "G-Boy," while armed with a 9 millimeter semi-automatic handgun, EARL EDWARD WEBB, a/k/a "E," defendants herein, and persons known to the Grand Jury, committed the home invasion robbery of the occupants of a residence located in Cumberland County, North Carolina, during which 15 ounces (426 grams) of crack cocaine were taken and an adult female was assaulted about the head with a firearm.

126. In or about March 1997, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, attempted to sell persons known to the Grand Jury approximately 6 to 7 one-fifth gram quantities of crack cocaine.

127. On April 25, 1997, GILBERT DEVON MELVIN, a/k/a "G-Boy," EVERETTE NATHANIEL QUILLER, defendants herein, and persons known to the Grand Jury, while armed with various types of firearms, attempted the home invasion robbery of the occupants of a residence located on 10th Street in Lumberton, North Carolina, during which GILBERT DEVON MELVIN, a/k/a "G-Boy," fired several shots at the victims inside the residence.

128. In or about April or May 1997, GILBERT DEVON MELVIN, a/k/a "G-Boy," EARL EDWARD WEBB, a/k/a "E," defendants herein, and a person known to the Grand Jury, while armed with various types of firearms, robbed a rival narcotics dealer from Dunn, North Carolina of 2 ounces of crack cocaine and one Glock 9 millimeter semi-automatic handgun.

129. On or about June 10, 1997, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, possessed approximately 7 grams of crack cocaine with the intent to distribute.

130. On or about August 15, 1997, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, possessed 2.3 grams of crack cocaine with the intent to distribute.

131. On or about June 20, 1997, PERRY ALLEN MOORE, defendant herein while armed with an undetermined type handgun, robbed 2 unidentified males of an undetermined quantity of powder cocaine in the Charlotte area of North Carolina.

132. In or about March 1990, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein was fronted a total of 72 grams of heroin and 168 grams of crack cocaine from a person known to the Grand Jury.

133. In or about April 1990, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, was fronted a total of 72 grams of heroin and 168 grams of crack cocaine from a person known to the Grand Jury.

134. In or about May 1990, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, was fronted a total of 72 grams of heroin and 168 grams of crack cocaine from a person known to the Grand Jury.

135. In or about June 1990, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, was fronted a total of 72 grams of heroin and 168 grams of crack cocaine from a person known to the Grand Jury.

136. In or about February 1994, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, sold a total of 196 grams of crack cocaine to a person known to the Grand Jury.

137. In or about March 1994, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, sold a total of 217 grams of crack cocaine to a person known to the Grand Jury.

138. In or about April 1994, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, sold a total of 210 grams of crack cocaine to a person known to the Grand Jury.

139. On or about April 23, 1994, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, while armed with a Ruger P-89 millimeter semi-automatic handgun, possessed one plastic bag of marijuana with the intent to distribute.

140. In or about May 1994, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, sold a total of 217 grams of crack cocaine to a person known to the Grand Jury.

141. In or about June 1994, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, sold a total of 210 grams of crack cocaine to a person known to the Grand Jury.

142. In or about July 1994, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, sold a total of 217 grams of crack cocaine to a person known to the Grand Jury.

143. In or about January 1995, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," sold one-half ounce (14.2 grams) of crack cocaine to a person known to the Grand Jury.

144. On or about August 26, 1995, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, possessed one plastic bag of powder cocaine and one plastic bag of crack cocaine with the intent to distribute.

145. On or about August 10, 1997, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, while armed with a Davis .380 semi-automatic handgun, possessed 1.5 grams of marijuana with the intent to distribute.

146. On or about October 22, 1997, ELVIN FREEMAN MORRISON, a/k/a "Freeman Steele," defendant herein, possessed 6.3 grams of crack cocaine with the intent to distribute.

147. On or about October 13, 1992, JEFFERY BERNARD PEATEN, defendant herein, possessed 4 grams of powder cocaine and 97.6 grams of marijuana with the intent to distribute.

148. In or about March 1993, JEFFERY BERNARD PEATEN, defendant herein, sold a person known to the Grand Jury one ounce (28.4 grams) of crack cocaine on 3 separate occasions.

149. In or about August or September 1993, JEFFERY BERNARD PEATEN, defendant herein, and a person known to the Grand Jury showed Napoleon Fisher 18 ounces (511.2 grams) of crack cocaine, of which Napoleon Fisher was fronted 7 ounces (198.8 grams) of the crack cocaine to distribute.

150. In or about April or May 1994, JEFFERY BERNARD PEATEN, defendant herein, sold 7 grams of heroin to a person known to the Grand Jury for $2,300.00.

151. In or about May 1994, JEFFREY BERNARD PEATEN, defendant herein, sold one-half ounce of powder cocaine to a person known to the Grand Jury.

152. In or about November 1994, JEFFERY BERNARD PEATEN, defendant herein, sold one ounce of heroin and fronted 200 grams of powder cocaine to a person known to the Grand Jury for $16,000.00.

153. In or about December 1994, JEFFERY BERNARD PEATEN, defendant herein, sold 9 ounces of powder cocaine to a person known to the Grand Jury for $6,500.00.

154. On or about May 28, 1996, JEFFERY BERNARD PEATEN, defendant herein, sold 51.1 grams of powder cocaine to an undercover agent of the North Carolina State Bureau of Investigation.

155. On or about June 14, 1996, JEFFERY BERNARD PEATEN, defendant herein, sold 50.5 grams of powder cocaine to an undercover agent of the North Carolina State Bureau of Investigation.

156. On or about July 26, 1989, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, sold 52.9 grams of powder cocaine to an undercover agent of the Cumberland County Bureau of Narcotics.

157. On or about June 28, 1991, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, possessed 1.9 grams of heroin with the intent to distribute.

158. In or about September 1991, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, and a person known to the Grand Jury purchased a total of 480 grams of heroin from a known narcotics distributor in Greenville, North Carolina.

159. In or about October 1991, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, and a person known to the Grand Jury purchased a total of 480 grams of heroin from a known narcotics distributor in Greenville, North Carolina.

160. In or about November 1991, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, and a person known to the Grand Jury purchased a total of 480 grams of heroin from a known narcotics distributor in Greenville, North Carolina.

161. In or about December 1991, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, and a person known to the Grand Jury purchased a total of 480 grams of heroin from a known narcotics distributor in Greenville, North Carolina.

162. In or about January 1992, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, and a person known to the Grand Jury did purchase a total of 480 grams of heroin from a known narcotics distributor in Greenville, North Carolina.

163. In or about February 1992, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, and a person known to the Grand Jury did purchase a total of 480 grams of heroin from a known narcotics distributor in Greenville, North Carolina.

164. On or about April 29, 1992, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, possessed 6.1 grams of heroin with the intent to distribute.

165. In or about November 1994, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, stole approximately one gram of heroin and 5 grams of powder cocaine that persons known to the Grand Jury had hidden in the Campbell Terrace Public Housing area in Fayetteville, North Carolina.

166. In or about February or March of 1995, ANTHONY BERNARD RAY, a/k/a "Ant," defendant herein, purchased one gram of heroin and 7 grams of crack cocaine from a person known to the Grand Jury.

167. In or about July 1995, EARL EDWARD WEBB, a/k/a "E," defendant herein, while armed with a chrome 9 millimeter semi-automatic handgun, purchased a total of 9 ounces (255.6 grams) of crack cocaine from a person known to the Grand Jury.

168. In or about June 1996, EARL EDWARD WEBB, a/k/a "E," defendant herein, while armed with a black 9 millimeter semi-automatic handgun, fronted a person known to the Grand Jury one-quarter ounce (7.1 grams) of crack cocaine.

169. In or about June 1996, EARL EDWARD WEBB, a/k/a "E," defendant herein, while armed with a 9 millimeter semi-automatic handgun, purchased a total of one-half ounce (14.2 grams) of crack cocaine from a person known to the Grand Jury.

170. In or about July 1996, EARL EDWARD WEBB, a/k/a "E," defendant herein, while armed with a 9 millimeter semi-automatic handgun, purchased a total of one-half ounce (14.2 grams) of crack cocaine from a person known to the Grand Jury.

171. In or about August 1996, EARL EDWARD WEBB, a/k/a "E," defendant herein, while armed with a 9 millimeter semi-automatic handgun, purchased a total of one-half ounce (14.2 grams) of crack cocaine from a person known to the Grand Jury.

172. In or about September 1996, EARL EDWARD WEBB, a/k/a "E," defendant herein, while armed with a 9 millimeter semi-automatic handgun, purchased a total of one-half ounce (14.2 grams) of crack cocaine from a person known to the Grand Jury.

173. In or about October or November 1996, EARL EDWARD WEBB, a/k/a "E," defendant herein, and persons known to the Grand Jury, while armed with various types of firearms, committed the home invasion robbery of the occupants of a residence located in Leisure Living Mobile Home Park, Fayetteville, North Carolina, during which $4,980.00 in U.S. currency and a Ruger 9 millimeter semi-automatic handgun were taken, and a person known to the Grand Jury was assaulted about the head with a handgun and several juveniles held at gunpoint.

174. In or about March 1997, EARL EDWARD WEBB, a/k/a "E," defendant herein, while armed with a black 9 millimeter semi-automatic handgun, and persons known to the Grand Jury committed the armed robbery of an unidentified narcotics dealer standing in front of a residence located at 626 Weiss Avenue, Fayetteville, North Carolina, during which 2 ounces (56.8 grams) of crack cocaine, 10 $10.00 bags of marijuana, and jewelry were taken, and during which the victim was severely assaulted about the body.

175. In or about June 1997, EARL EDWARD WEBB, a/k/a "E," defendant herein, purchased a total of 7 grams of crack cocaine from a person known to the Grand Jury.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

In or about January 1997, in the Eastern District of North Carolina, TERRY DEMETRIUS BYRD, defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924(c)(1).

COUNT THREE

On or about July 17, 1997, in the Eastern District of North Carolina, TERRY DEMETRIUS BYRD, defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924(c)(1).

COUNT FOUR

On or about August 1, 1997, in the Eastern District of North Carolina, TERRY DEMETRIUS BYRD, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," GILBERT DEVON MELVIN, a/k/a "G-Boy," and EARL EDWARD WEBB, a/k/a "E," defendants herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT FIVE

On or about June 20, 1997, in the Eastern District of North Carolina, KEISHA CARTER, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," PERRY ALLEN MOORE, defendants herein, and a person known to the Grand Jury knowingly used and carried a

firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT SIX

On or about June 20, 1997, in the Eastern District of North Carolina, KEISHA CARTER and DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendants herein, and a person known to the Grand Jury, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT SEVEN

In or about October 1996, in the Eastern District of North Carolina, LARRY EARL DYE, defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT EIGHT

In or about January 1996, in the Eastern District of North Carolina, VERA VERONICA ELLIOTT, a/k/a "B.B.," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT NINE

In or about July 1995, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TEN

In or about February 1996, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," and TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," defendants herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT ELEVEN

In or about June 1996, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWELVE

In or about September 1996, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924(c)(1).

COUNT THIRTEEN

In or about March 1997, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," and EVERETTE NATHANIEL QUILLER, defendants herein, and a person known to the Grand Jury knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to

distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT FOURTEEN

On or about June 15, 1997, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," PERRY ALLEN MOORE, and EVERETTE NATHANIEL QUILLER, defendants herein, and a person known to the Grand Jury knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924(c)(1) and 2.

COUNT FIFTEEN

On or about June 16, 1997, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," PERRY ALLEN MOORE, defendants herein, and a person known to the Grand Jury knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT SIXTEEN

In or about July 1997, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT SEVENTEEN

On or about July 12, 1997, in the Eastern District of North Carolina, DEMARIO ANTWAIN HOPKINS, a/k/a "Mario," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT EIGHTEEN

In or about June 1995, in the Eastern District of North Carolina, JAMES DAVID JOHNSON, a/k/a "Buddy," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT NINETEEN

On or about August 10, 1996, in the Eastern District of North Carolina, JAMES DAVID JOHNSON, a/k/a "Buddy," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY

On or about April 28, 1997, in the Eastern District of North Carolina, KENNETH WAYNE JUDD, a/k/a "Big Boy," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-ONE

In or about January 1994, in the Eastern District of North Carolina, MICHAEL TYWAN MARSH, a/k/a "Plump," defendant herein, knowingly used and or carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-TWO

In or about September 1996, in the Eastern District of North Carolina, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-THREE

On or about September 20, 1996, in the Eastern District of North Carolina, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-FOUR

On or about January 23, 1997, in the Eastern District of North Carolina, GARY WAYNE MCCOY, a/k/a "Suave," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-FIVE

In or about August 1995, in the Eastern District of North Carolina, TIVARUS MONIENTO MCRAE, a/k/a "Tat-Killer," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-SIX

In or about February 1997, in the Eastern District of North Carolina, TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer, " defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-SEVEN

In or about March 1977, in the Eastern District of North Carolina, TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-EIGHT

In or about May 1997, in the Eastern District of North Carolina, TIVARUS MONTIENTO MCRAE, a/k/a "Tat-Killer," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT TWENTY-NINE

In or about February 1995, in the Eastern District of North Carolina, WILLIE JEROME MCRAE, defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT THIRTY

In or about November 1, 1996, in the Eastern District of North Carolina, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT THIRTY-ONE

In or about January 1997, in the Eastern District of North Carolina, GILBERT DEVON MELVIN, a/k/a "G-Boy," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT THIRTY-TWO

In or about February 1997, in the Eastern District of North Carolina, GILBERT DEVON MELVIN, a/k/a "G-Boy," and EARL EDWARD WEBB, a/k/a "E," defendants herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT THIRTY-THREE

On or about April 25, 1997, in the Eastern District of North Carolina, GILBERT DEVON MELVIN, a/k/a "G-Boy," and EVERETTE NATHANIEL QUILLER, defendants herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute

crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT THIRTY-FOUR

In or about April or May 1997, in the Eastern District of North Carolina, GILBERT DEVON MELVIN, a/k/a "G-Boy," and EARL EDWARD WEBB, a/k/a "E," defendants herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, and did aid and abet each other in so doing, in violation of Title 18, United States Code, Sections 924 (c)(1) and 2.

COUNT THIRTY-FIVE

On or about June 20, 1997, in the Eastern District of North Carolina, PERRY ALLEN MOORE, defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT THIRTY-SIX

In or about July 1995, in the Eastern District of North Carolina, and EARL EDWARD WEBB, a/k/a "E," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking

offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT THIRTY-SEVEN

In or about October or November 1996, in the Eastern District of North Carolina, EARL EDWARD WEBB, a/k/a "E," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

COUNT THIRTY-EIGHT

In or about March 1997, in the Eastern District of North Carolina, EARL EDWARD WEBB, a/k/a "E," defendant herein, knowingly used and carried a firearm during and in relation to a drug trafficking offense prosecutable in a court of the United States, that is, conspiracy to distribute and possess with the intent to distribute crack cocaine, in violation of Title 18, United States Code, Section 924 (c)(1).

A TRUE BILL

/s/_____
FOREPERSON

DATE: 5 March 1998

/s_____
JANICE McKENZIE COLE
United States Attorney

Supreme Court U.S.
FILED
DEC 30 2002
OFFICE OF THE CLERK

No. 02-655

In the Supreme Court of the United States

KEISHA CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner correctly received consecutive sentences on two counts of using or carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c), when both convictions were based on a single predicate drug trafficking offense.

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In the Supreme Court of the United States

No. 02-655

KEISHA CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 300 F.3d 415. The decision of the district court (Pet. App. 32-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2002. The petition for a writ of certiorari was filed on October 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on two counts of using and carry-

ing a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). She was sentenced to five years of imprisonment on the first count and a consecutive 20-year term of imprisonment on the second count. Pet. App. 42.[1] The court of appeals affirmed. *Id.* at 1-31.

1. Petitioner was part of a drug trafficking conspiracy operating out of the Campbell Terrace Housing Project in Fayetteville, North Carolina. During 1997, a number of individuals living in the Project or their acquaintances were involved in drug sales. Those individuals also committed robberies or other acts of violence to obtain drugs or money with which to procure additional drugs for resale. Pet. App. 36; Gov't C.A. Br. 14, 46.

In the early morning of June 20, 1997, a group of individuals including petitioner, George Tyrell Gibbs (petitioner's boyfriend), DeMario Hopkins, Dwayne Melvin, and Kenneth Davis gathered to search for a robbery target. The group was armed with a handgun, an assault rifle, and a "street sweeper" shotgun. Petitioner suggested to the group that they rob Eric Carter, another drug dealer and an acquaintance of hers. The group drove to Eric Carter's home. Petitioner approached the house but returned after a short time, telling the group that Eric Carter had asked her to return later. Petitioner then phoned Eric Carter for the ostensible purpose of arranging for the purchase of crack cocaine. After that, petitioner and her cohorts returned to Eric Carter's residence. Petitioner approached the door, and when Carter opened it, petitioner said the "she was sorry" and returned to the ve-

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[1] Pages 40-61 of the appendix to the petition do not reflect the page number.

hicle. Gibbs, Davis and Hopkins, each brandishing a firearm, then forced themselves into the residence. While Gibbs held his pistol to Eric Carter's head, the other intruders searched the residence. The group took a quantity of marijuana, several hundred dollars in cash, a wallet, and jewelry, and then fled. Pet. App. 37; Gov't C.A. Br. 15-16, 46-47; C.A. App. 511-515, 667.

After robbing Eric Carter's residence, the group drove to Clinton, North Carolina, and stayed in a motel there for the night. The next day, they went to the residence of Davis's girlfriend, where, joined by three other individuals, they planned to rob a bank in Garland, North Carolina, in order to obtain more money to purchase drugs for resale. The plan called for petitioner to drive the getaway vehicle. Petitioner, accompanied by Gibbs and Melvin, drove to the bank in the Chevrolet Blazer in which the group had been traveling. The other five conspirators drove to the bank in a Nissan Sentra. Two of the men entered the bank, armed with a handgun and an assault rifle. Fearing that they had been discovered, the group withdrew from the bank without completing the robbery and retreated to the Blazer to join petitioner and the two other occupants. DeMario Hopkins, Edward Ward, and Kenneth Davis got into the Blazer, and as the group left the area, they reloaded all of the firearms into the Blazer. Pet. App. 37-38; Gov't C.A. Br. 16-17, 47-48; C.A. App. 516-520.

Petitioner then suggested that the group go to Charlotte, North Carolina, where there "would be probably some easy robberies there when [they] got there." C.A. App. 521. In Charlotte, several of the conspirators robbed two white males of a small quantity of cocaine. In addition, they sold a portion of the mari-

juana that they had stolen from Eric Carter. Pet. App. 38; Gov't C.A. Br. 17; C.A. App. 525-526.

On June 26, 1997, petitioner and Gibbs returned to Fayetteville. They were arrested later that day. Gov't C.A. Br. 17; C.A. App. 526-527.

2. On March 5, 1998, petitioner was indicted on one count of conspiracy to distribute and to possess with the intent to distribute crack cocaine, cocaine powder, heroin, and marijuana, in violation of 21 U.S.C. 846 (Count 1). The 175 overt acts alleged in the conspiracy count included the June 20, 1997, home robbery of Eric Carter, and the attempted robbery of the Garland bank the following day. Both overt acts alleged that the perpetrators were armed with various types of firearms and identified petitioner as a participant. Pet. App. 71, 77.

In addition, petitioner was charged on two counts of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c) (Counts 5 and 6). Pet. App. 109-110. At the time of the alleged offenses, that statute provided that, "[w]hoever, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years." 18 U.S.C. 924(c)(1) (1994). The statute also provided that, "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years," and that no "term of imprisonment imposed under this subsection [shall] run

concurrently with any other term of imprisonment." *Ibid.*[2]

Both of the Section 924(c) counts alleged as the predicate drug trafficking offense the conspiracy charged in Count 1 of the indictment, and both were based on the events that took place "[o]n or about" June 20, 1997. Pet. App. 109-110. Count 6 concerned the robbery of Eric Carter's residence on June 20, 1997, and Count 5 concerned the attempted robbery of a bank in Garland, North Carolina, the next day. Gov't C.A. Br. 46-48.

3. The jury found petitioner guilty on both Section 924(c) counts, but was unable to reach a verdict on the conspiracy count, resulting in the entry of a mistrial on that charge. Pet. App. 34. Petitioner moved for a judgment of acquittal on the firearms counts, contending that her Section 924(c) convictions could not stand without a conviction on the predicate drug trafficking charge. The district court denied the motion. Pet. App. 32-39. At sentencing, petitioner, although acknowledging that Fourth Circuit decisions were to the contrary, objected to the imposition of a consecutive 20-year sentence on the second Section 924(c) count on the ground that a number of other circuits do not permit convictions on multiple Section 924(c) counts tied to a single predicate drug trafficking offense. C.A. App. 1590. The district court rejected that argument, and in accordance with Fourth Circuit precedent, imposed a five-year

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[2] Effective November 13, 1998, Section 924(c) was amended to its present form. Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1, 112 Stat. 3469. Among other revisions to Section 924(c), the 1998 amendment increased the penalty for a second or subsequent conviction from a 20-year term of imprisonment to a 25-year minimum term.

term of imprisonment on Count 5 and a consecutive 20-year term on Count 6. *Id.* at 1591.

4. On appeal, petitioner again argued that she could not be convicted and sentenced on two Section 924(c) counts arising from a single predicate drug trafficking offense. The court of appeals rejected that claim. The court observed that a "number of other circuits" agreed with petitioner's view of Section 924(c), but held that it had "already reached the issue and decided it in a manner contrary to [petitioner's] position." Pet. App. 12 (citing *United States* v. *Camps*, 32 F.3d 102 (4th Cir. 1994), cert. denied, 513 U.S. 1158 (1995).[3]

ARGUMENT

Petitioner renews her contention that the district court erred in imposing consecutive sentences on her two Section 924(c) convictions because the two counts were predicated on a single drug trafficking offense. Review of that question is not warranted.

1. Petitioner is correct that the courts of appeals are divided on whether a single predicate offense can support more than one Section 924(c) conviction and sentence. At the time of petitioner's trial, Section 924(c) imposed a five-year term of imprisonment for using or carrying a firearm during and in relation to a drug traf-

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[3] The court also rejected petitioner's claim that the failure of the jury to reach a verdict against her on the predicate drug trafficking charge precluded a conviction on the Section 924(c) counts. The court held, in agreement with the other courts of appeals that have addressed the issue, that Section 924(c) does not require a conviction on the predicate offense. Pet. App. 13. Instead, the court concluded, a showing that a reasonable jury could have found the defendant guilty on the predicate charge was sufficient. *Id.* at 13-14. Petitioner does not raise in this Court her claim that the absence of a conviction on the underlying predicate offense precludes a conviction under Section 924(c).

ficking offense, and imposed a consecutive 20-year term for a second or subsequent Section 924(c) conviction. 18 U.S.C. 924(c) (1994).[4] The Fourth Circuit in this case followed a previous decision in which it held that a "defendant who has 'used' or 'carried' a firearm on several separate occasions during the course of a single continuing offense * * * has committed several section 924(c)(1) offenses." *United States* v. *Camps*, 32 F.3d 102, 107 (4th Cir. 1994), cert. denied, 513 U.S. 1158 (1995). The Eighth Circuit agrees with the Fourth Circuit's approach. See *United States* v. *Lucas*, 932 F.2d 1210, 1223 (8th Cir.), cert. denied, 502 U.S. 869 (1991).

The majority of the courts of appeals have adopted the contrary view. Those courts have held that multiple Section 924(c) convictions cannot be based on a single predicate offense. See *United States* v. *Anderson*, 59 F.3d 1323, 1334 (D.C. Cir.) (en banc) (applying rule of lenity and holding that "only one § 924(c)(1) violation may be charged in relation to one predicate crime"), cert. denied, 516 U.S. 999 (1995); *United States* v. *Lindsay*, 985 F.2d 666, 674 (2d Cir.), cert. denied, 510 U.S. 832 (1993); *United States* v. *Privette*, 947 F.2d 1259, 1262 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992); *United States* v. *Sims*, 975 F.2d 1225, 1233 (6th Cir. 1992), cert. denied, 507 U.S. 932 (1993); *United States* v. *Smith*, 924 F.2d 889, 894

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[4] Although Section 924(c) has been amended since petitioner's indictment and trial, see note 2, *supra*, the amendment does not affect the issue in this case. In its amended form, the statute continues to apply to "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm," and continues to impose a mandatory consecutive term of imprisonment—now of 25 years—"[i]n the case of a second or subsequent conviction." 18 U.S.C. 924(c)(1)(A) and (C).

(9th Cir. 1991); *United States* v. *Hamilton*, 953 F.2d 1344, 1346 (11th Cir.), cert. denied, 506 U.S. 871 (1992).[5]

2. Despite the conflict among the courts of appeals, this Court's review is not warranted. On August 24, 1999, more than one year after the indictment was returned in this case, the Assistant Attorney General for the Criminal Division issued a policy memorandum captioned "Multiple Convictions and Sentences Under 18 U.S.C. § 924(c)." App. A, *infra*, 1a-4a. Noting the conflict among the courts of appeals, the policy memorandum instructs United States Attorneys not to charge multiple Section 924(c) counts based on a single predicate offense. Rather, prosecutors "are instructed in all future cases to adopt the practice of basing each Section 924(c) count in an indictment upon a separate predicate offense." *Id.* at 3 a. The same policy is also reflected in the Department of Justice's Federal Firearms Manual, which advises prosecutors to draft indictments so that each Section 924(c) count is based on a separate predicate offense. United States Dep't of Justice, Office of Legal Education, *Federal Firearms Manual* § 4.25, at 192-193 (3d ed. 2001); App. B, *infra*, 7a.

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[5] Petitioner asserts (Pet. 11) that the government has repeatedly conceded in the courts of appeals "that the use of more than one gun will not support multiple counts under § 924(c)(1) for the use of a firearm during a single drug trafficking crime." The question in this case, however, is not whether each firearm used in a drug trafficking crime can support a separate Section 924(c) conviction. Instead, the question is whether each distinct use of a firearm—whether the same firearm or a different one—can support a separate Section 924(c) conviction, even if each distinct use occurs during the course of a single predicate drug trafficking offense.

Although the prosecution in this case predated issuance of the policy memorandum, the government is unaware of any prosecution after the policy was adopted in which multiple Section 924(c) counts have been charged based upon a single predicate offense. We anticipate that prosecutors will continue to follow those instructions and will base each Section 924(c) charge on a separate predicate offense. As a result, the conflict among the approaches of the courts of appeals is of little and diminishing continuing significance, and does not require this Court's resolution. The Court has denied petitions for certiorari raising the same issue in other cases in which the prosecutions predated establishment of the Department's policy. See *Scott* v. *United States*, 531 U.S. 1010 (2000) (No. 99-10053); *Wilkerson* v. *United States*, 528 U.S. 927 (1999) (No. 98-9595).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOHN F. DE PUE
Attorney

DECEMBER 2002

APPENDIX A

[SEAL OMITTED]

August 24, 1999

MEMORANDUM

To: All United States Attorneys, First Assistant United States Attorneys, and Criminal Division Section Chiefs and Office Directors

From: James K. Robinson /s/ JKR
Assistant Attorney General

Subject: Multiple Convictions and Sentences Under 18 U.S.C. § 924(c)

As amended in November 1998, 18 U.S.C. § 924(c) prohibits, *inter alia*, using or carrying a firearm during and in relation to any federal crime of violence or drug trafficking crime. The sentencing formula under this Section provides, among other things, for a mandatory minimum five-year term for a first offense and a mandatory minimum consecutive 25-year term in the case of a second or subsequent conviction. In *Deal* v. *United States*, 508 U.S. 129 (1993), the Supreme Court held that such consecutive sentences must be imposed on the basis of multiple convictions under Section 924(c) even when those convictions result from a single criminal proceeding.

The courts of appeals, however, are divided on the question whether the proper unit of prosecution under Section 924(c) is the using/carrying of a firearm or the commission of the predicate offense. Under the former theory, a single continuing drug trafficking conspiracy could support multiple using or carrying convictions and the imposition of consecutive sentences. Under the latter theory, each using/carrying count must be supported by a separate predicate crime.

The majority of the courts of appeals that have addressed the issue have reasoned that Section 924(c) emphasizes the relationship between the firearm and the underlying crime rather than the individual acts of using or carrying, and that, consequently, the predicate offense is the proper unit of prosecution. *See, e.g., United States v. Anderson*, 59 F.3d 1323, 1334 (D.C. Cir. 1995) (en banc) (relying upon rule of lenity); *United States v. Lindsay*, 985 F.2d 666, 672-676 (2d Cir.) (same), *cert. denied*, 510 U.S. 832 (1993); *United States v. Privette*, 947 F.2d 1259, 1262-1263 (5th Cir. 1991) (relying upon statutory interpretation), *cert. denied*, 503 U.S. 912 (1992); *United States v. Sims*, 975 F.2d 1225, 1233-1236 (6th Cir. 1992) (same), *cert. denied*, 507 U.S. 932 (1993); *United States v. Cappas*, 29 F.3d 1187, 1189 (7th Cir. 1994) (same), *cert. denied*, 513 U.S. 1158 (1995); *United States v. Fontanilla*, 849 F.2d 1257, 1258-1259 (9th Cir. 1988); *United States v. Moore*, 958 F.2d 310, 312-314 (10th Cir. 1992); *United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir.), *cert. denied*, 506 U.S. 871 (1992).

Two circuits, however, have adopted the contrary approach and have held that a single predicate offense, such as a drug trafficking conspiracy, will support multiple Section 924(c) counts and consecutive sentences whenever the using or carrying occurs on different occasions. *See United States v. Camps*, 32 F.3d 102 (4th Cir. 1994), *cert. denied*, 513 U.S. 1158 (1995); *United States v. Edwards*, 994 F.2d 417, 423-424 (8th Cir.), *cert. denied*, 510 U.S. 1014 (1993). Recently, a petition for a writ of certiorari, challenging the imposition of multiple Section 924(c) convictions and consecutive sentences on the basis of a single drug trafficking conspiracy, has highlighted the conflict among the circuits on this

issue. *See Wilkerson v. United States*, No. 98-9595, petition for certiorari filed June 1, 1999. The petition in *Wilkerson* is now pending disposition by the Supreme Court.

After careful evaluation of the question, it is the Department's position that indictments henceforth should be charged in accordance with the majority position taken by the courts of appeals.[1] Consequently, United States Attorneys' Offices are instructed in all future cases to adopt the practice of basing each Section 924(c) count in an indictment upon a separate predicate offense. Where an indictment charging multiple Section 924(c) counts on the basis of a single predicate conspiracy offense is pending trial, prosecutors should consider either superseding the indictment so as to allege a single Section 924(c) count based upon the entire conspiracy or, alternatively, seeking the dismissal of subsequent counts.

In instances where a firearm is used or carried during an ongoing drug trafficking conspiracy, prosecutors will frequently be able to charge separate Section 924(c) counts, where appropriate, by parsing the continuing conspiracy into separate drug trafficking offenses and linking each "using" or "carrying" to the different substantive counts. This suggestion, however, does not constitute an expression of Criminal Division policy

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[1] In U.S. Department of Justice Office of Legal Education, *Federal Firearms Offenses*, (July 1995, revised June 1999), the authors advised that U.S. Attorneys should desist from the practice of basing multiple Section 924(c) counts on a single drug trafficking predicate offense and, instead, should base each Section 924(c) count upon a different predicate crime. See *Federal Firearms Offenses*, § 4-23 (1995).

that seeking an indictment on multiple Section 924(c) counts is expected as a matter of routine practice.

Should you have any questions concerning this policy or its implementation, please contact John De Pue or Nancy Oliver of the Terrorism and Violent Crime Section (202) 514-0849.

APPENDIX B

4.25 Separate charges based on the use of different firearms or firearms on temporally discrete occasions

As suggested in the preceding section, most of the courts that have addressed the question are in agreement that the use of multiple firearms during and in relation to a single predicate crime constitutes a single violation of § 924(c). *See, e.g., Pena-Lora*, 225 F.3d at 32 ("the imposition of consecutive sentences under subsection 924(c) for using multiple weapons during a single crime of violence would impinge upon fundamental 'double jeopardy' principles"); *United States v. Cappas*, 29 F.3d 1187, 1189 (7th Cir. 1994) (collecting cases); *United States v. Taylor*, 13 F.3d 986, 993 (6th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 674 (2d Cir. 1993); *United States v. Martinez*, 967 F.2d 1343, 1348 (9th Cir. 1992) (quoting *United States v. Smith*, 924 F.2d 889, 894 (9th Cir. 1991) ("'We, along with other circuits, have required that each § 924(c) charge be based on a separate predicate offense'".)); *United States v. Moore*, 958 F.2d 310, 313-14 (10th Cir. 1992); *United States v. Privette*, 947 F.2d 1259, 1262 (5th Cir. 1991). *Compare United States v. McManus*, 23 F.3d 878, 884 (4th Cir. 1994) (multiple § 924(c) convictions proper where supported by separate drug trafficking offenses). *But see United States v. Lucas*, 932 F.2d 1210, 1223-23 (8th Cir. 1991) (court authorized multiple § 924(c) convictions for the use of more than one firearm during a single drug trafficking offense when the different firearms played separate roles in the crime). As explained in the preceding section, in cases where different types of firearms are employed during the commission of a single predicate offense, the mandatory minimum sen-

tence for the § 924(c) violation is governed by the firearm carrying the heaviest penalty.

The unit of prosecution issue assumes added complexity in cases where the defendant uses firearms on different occasions during the course of an ongoing narcotics conspiracy. Two courts of appeals that have considered such facts have held that, in charging § 924(c) violations, the unit of prosecution is the use of the firearm, rather than the underlying narcotics crime or crime of violence. Consequently, these cases hold that a single predicate offense, such as conspiracy to distribute narcotics, will support multiple § 924(c) counts and cumulative mandatory sentences when each use of a firearm occurs on a different occasion. *See United States v. Camps*, 32 F.3d 102, 106-09 (4th Cir 1994) ("A defendant who has 'used' or 'carried' a firearm on several separate occasions during the course of a single continuing offense, therefore has committed several § 924(c) offenses."); *United States v. Edwards*, 994 F.2d 417, 423-24 (8th Cir. 1993) ("'each separate use of a firearm in relation to a . . . drug trafficking crime is punishable under § 924(c) regardless of whether other § 924(c) charges are related to the same predicate offense'"). *See also United States v. Mabry*, 3 F.3d 244, 250 (8th Cir. 1993) (two different firearms used over thirteen months in furtherance of same conspiracy); *United States v. Canterbury*, 2 F.3d 305, 307 (8th Cir. 1993).

In contrast, most of the courts of appeals that have addressed the issue have reasoned that § 924(c) "emphasizes the relationship between the firearms and the underlying drug-trafficking crime, rather than the individual firearms themselves," and that, consequently, the predicate offense, not the firearm, is the unit of

prosecution. *United States v. Taylor*, 13 F.3d 986, 993 (6th Cir. 1994). Under this approach, as the unit of prosecution is based upon the underlying predicate offense, a single firearm can support multiple convictions as long as each is based upon a different crime. *See United States v. Morris*, 247 F.3d 1080 (10th Cir. 2001) (a single predicate crime cannot sustain multiple § 924(c) convictions for using and brandishing); *United States v. Dahlman*, 13 F.3d 1391, 1401 (10th Cir. 1993). Under this analysis, each § 924(c) must, therefore, be based upon a different predicate offense. A single continuing conspiracy—even one that embraces multiple discrete firearms transactions—is insufficient to support multiple § 924(c) counts. See, *United States v. Tolliver*, 61 F.3d 1189, 1222 (5th Cir. 1995); *United States v. Anderson*, 59 F.3d 1323, 1334 (D.C. Cir.) (en banc) (invoking rule of lenity), *rev'g* 39 F.3d 331 (D.C. Cir. 1994); *Taylor*, 13 F.3d at 992; *United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992) (reversing convictions on multiple § 924(c) counts where based upon single conspiracy predicate).

On August 24, 1999, the Assistant Attorney General for the Criminal Division issued a memorandum captioned "Multiple Convictions and Sentences under 18 U.S.C. § 924(c)," which appears as Appendix A of this Manual. The Memorandum instructed all United States Attorneys to adopt the majority approach of basing each § 924(c) count in an indictment upon a separate predicate offense. It also advised that, where a firearm is used or carried during an ongoing drug trafficking conspiracy, prosecutors should, where appropriate, parse the conspiracy into separate drug trafficking offenses and link each "using" or "carrying" incident to the different substantive counts.

Finally, as an exception to this "unit of prosecution" rule, several courts of appeals have held that, where the occurrence of multiple predicate offenses is simultaneous and based on virtually the same conduct, the offenses will support only one § 924(c) conviction. In *United States v. Finley*, 245 F.3d 199 (2d Cir. 2001), a divided Second Circuit, invoking the rule of lenity, set aside the consecutive § 924(c) sentence imposed as the result of the defendant's conviction for possessing a narcotic with intent to distribute. The possession conviction was predicated upon the defendant's retaining a portion of a drug cache immediately following the consummation of a distribution offense. The panel majority justified its action by explaining that:

> where a defendant is charged with the continuous, constructive possession of a firearm in furtherance of a sale of a part of a quantity of narcotics possessed, coupled with the continued possession of the remainder immediately following the sale, Congressional intent is not sufficiently clear to compel [the imposition of consecutive § 924(c) sentences].

Id. at 208; *see also United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998) (multiple offenses, based upon a single homicidal act by use of a firearm, will support only one sentence under § 924(c)); *United States v. Johnson*, 25 F.3d 1335, 1338 (6th Cir. 1994) (en banc) (possession of one or more firearms in conjunction with predicate offenses involving simultaneous possession of different drugs should constitute only one offense under § 924(c)), *rev'd on other grounds*, 529 U.S. 53 (2000). *But see Finley*, *id.* at 209 (Winter, J. dissenting) (noting that nothing in the language of § 924(c) requires that the predicate offenses be separated by a particular amount of time). Consistent with the August 24, 1999,

Memorandum discussed above, we do not encourage prosecutors to generate multiple § 924(c) counts by charging a single criminal act as multiple predicate offenses or parsing the single employment of a firearm in connection with a single predicate offense into multiple § 924(c) counts.